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NORTH CAROLINA REPORTS
VOL. 183

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1922

REPORTED BY
ROBERT C. STRONG

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OF THE

SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1922

CHIEF JUSTICE:

WALTER CLARK.

ASSOCIATE JUSTICES:

PLATT D. WALKER,
WILLIAM A. HOKE,
W. P. STACY,
W. J. ADAMS.

ATTORNEY-GENERAL:

JAMES S. MANNING.

ASSISTANT ATTORNEY-GENERAL:

FRANK NASH.

SUPREME COURT REPORTER:

ROBERT C. STRONG.

CLERK OF THE SUPREME COURT:

JOSEPH L. SEAWELL.

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JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

EASTERN DIVISION

W. M. Bond	First	Chowan.
George W. Connor	Second	Wilson.
John H. Kerr	Third	Warren.
F. A. Daniels	Fourth	Wayne.
J. Lloyd Horton	Fifth	Pitt.
O. H. Allen	Sixth	Lenoir.
T. H. Calvert	Seventh	Wake.
E. H. Cranmer	Eighth	Brunswick.
C. C. Lyon	Ninth	Bladen.
W. A. Devin	Tenth	Granville.

WESTERN DIVISION

H. P. Lane	Eleventh	Rockingham.
Thomas J. Shaw	Twelfth	Guilford.
W. E. Brock	Thirteenth	Anson.
W. F. Harding	Fourteenth	Mecklenburg.
B. F. Long	Fifteenth	Iredell.
J. L. Webb	Sixteenth	Cleveland.
T. B. Finley	Seventeenth	Wilkes.
J. Bis Ray	Eighteenth	Yancey.
P. A. McElroy	Nineteenth	Madison.
T. D. Bryson	Twentieth	Swain.

SOLICITORS

EASTERN DIVISION

J. C. B. Ehringhaus	First	Pasquotank.
Richard G. Allsbrook	Second	Edgecombe.
Garland E. Midyette	Third	Northampton.
Walter D. Siler	Fourth	Chatham.
Jesse H. Davis	Fifth	Craven.
J. A. Powers	Sixth	Lenoir.
H. E. Norris	Seventh	Wake.
Woodus Kellum	Eighth	New Hanover.
S. B. McLean	Ninth	Robeson.
S. M. Gattis	Tenth	Orange.

WESTERN DIVISION

S. P Graves	Eleventh	Surry.
John C. Bower	Twelfth	Davidson.
M. W. Nash	Thirteenth	Richmond.
G. W. Wilson	Fourteenth	Gaston.
Hayden Clement	Fifteenth	Rowan.
R. L. Huffman	Sixteenth	Burke.
J. J. Hayes	Seventeenth	Wilkes.
G. D. Bailey	Eighteenth	Transylvania.
Geo. M. Pritchard	Nineteenth	Madison.
Gilmer A. Jones	Twentieth	Macon.

LICENSED ATTORNEYS

SPRING TERM, 1922

The following were licensed to practice law by the Supreme Court, Spring Term, 1922:

Alley, Felix Eugene, Jr.	Waynesville.
Allran, Guy Hilary	Fayetteville.
Arrington, Samuel Lewis	Rocky Mount.
Ashby, Clarence Garnett	Raleigh.
Bobbitt, William Haywood	Charlotte.
Boney, Daniel Clinton	Kinston.
Brown, Robert Edward Lee	Chadbourn.
Caviness, Joseph Edward	Durham.
Daniels, Virgil Clayton	Boydton, Va.
Eure, Thaddeus Armie	Eure.
Fesperman, Gideon Van Poole	Spencer.
Floyd, William Yates	Orrum.
Fountain, Theodore King	Raleigh.
France, Douglas Carter	Raleigh.
Francis, William Roy	Waynesville.
Frazier, Robert Haines	Greensboro.
Grier, Frank Luttrell	Statesville.
Hall, Grant	Washington, D. C.
Hayes, James Madison	North Wilkesboro.
Helms, Fred Bryan	Monroe.
Herring, Paul Dominic	Clinton.
Hester, William Fred	St. Paul.
Holding, Clem Bolton	Raleigh.
Huffman, Ewart William Gladstone	Greensboro.
Hunnicutt, Johnnie Will	Asheville.
Jordan, James Floyd	Rondas.
Jordan, John LeRoy	Washington, D. C.
Kearney, Henry Crawford	Franklinton
Kernodle, Lovick Harden	Graham.
Lewis, Lottie Elizabeth	Raleigh.
Livingstone, John Alexander	Raleigh.
McAuley, Eurid Reid	Huntersville.
McAuley, Hugh Morrison	Huntersville.
McLean, Charles Blount	Wilson.
McLeod, John Blount	Lumberton.
McMahon, James Francis	Raleigh.
Marshbanks, Flossie Eleanor	Mars Hill.
Maupin, William Chapman, Jr.	Salisbury.
Monteith, Hugh Ednie	Sylva.
Moody, Ralph Manning	Murphy.
Morgan, Zebulon Vance	Marshville.
Nicholson, William Moore	Lattimore.
Pearce, Fred Marvin	Zebulon.
Penny, William Burbank	Hendersonville.
Penny, William Henry	Raleigh.
Pool, Calvin Parker	Auburn (Clayton).

Powell, Loudolph Carl	Smithfield.
Prince, Lawrence Benton	Laurinburg.
Randolph, John Peyton	Bryson City.
Ridings, Clarence Osborne	Fingerville, S. C.
Ripple, Hoyle Clifton	Winston-Salem.
Rives, Edwin Earl	Greensboro.
Robinson, Conly Eason	Charlotte.
Robinson, Samuel Medford	Clyde.
Royall, Hubert	Clinton.
Sessoms, Carl Burt	Colerain.
Shepard, Robert Benjamin	Wilmington.
Smathers, Ray Kenneth	Emory University, Ga.
Smith, James Fulton	Greensboro.
Stroud, Cecil Nixon	Kinston.
Swicegood, Ira Rose	Salisbury.
Taylor, James Lloyd	Rutherfordton.
Thomas, Benjamin Hilton	Rocky Mount.
Tucker, Joseph Granbery	Plymouth.
Turner, Lindsay Harding	Raleigh.
Wiegand, Carl	Chapel Hill.
West, Paul Caleb	Moyock.
Whitener, Louie Augustus	Hickory.
Williams, Herbert Taylor	Chase City, Va.
Young, James Robert	Dunn.

The following admitted under recent Comity Act:

Fielder, William James	Wilmington.
McGowan, John Calhoun	Charlotte.
Scott, Royal Roscoe	Southern Pines.

CALENDAR OF COURTS

TO BE HELD IN

NORTH CAROLINA DURING THE FALL OF 1922

SUPREME COURT

The Supreme Court meets in the city of Raleigh on the first Monday in February and the last Monday in August of every year. The examination of applicants for license to practice law, to be conducted in writing, takes place one week before the first Monday in each term.

The Judicial Districts will be called in the Supreme Court in the following order:

	FALL TERM, 1922
First District	August 29
Second District	September 5
Third and Fourth Districts	September 12
Fifth District	September 19
Sixth District	September 26
Seventh District	October 3
Eighth and Ninth Districts	October 10
Tenth District	October 17
Eleventh District	October 24
Twelfth District	October 31
Thirteenth District	November 7
Fourteenth District	November 14
Fifteenth and Sixteenth Districts	November 21
Seventeenth and Eighteenth Districts	November 28
Nineteenth District	December 5
Twentieth District	December 12

SUPERIOR COURTS, FALL TERM, 1922

The parenthesis numerals following the date of a term indicates the number of weeks during which the term may hold.

In many instances the statutes apparently create conflicts in the terms of court.

THIS CALENDAR IS UNOFFICIAL

EASTERN DIVISION

FIRST JUDICIAL DISTRICT

Fall Term, 1922—*Judge Kerr.*

Camden—July 17† (1); Sept. 25 (1).
Beaufort—July 24* (1); Oct. 2† (2); Nov. 20 (1); Dec. 18†.
Gates—July 31; Dec. 11.
Tyrrell—Aug. 28† (1); Nov. 27 (1).
Currituck—Sept. 4 (1).
Chowan—Sept. 11 (1); Dec. 4 (1).
Pasquotank—Sept. 18 (1); Nov. 6 (1); Nov. 13† (1).
Hyde—Oct. 16 (1).
Dare—Oct. 23 (1).
Perquimans—Oct. 30 (1).

SECOND JUDICIAL DISTRICT

Fall Term, 1922—*Judge Daniels.*

Washington—July 10; Oct. 16.
Nash—Aug. 28 (1); Oct. 9 (1); Nov. 27 (2).
Wilson—Sept. 4 (1); Oct. 2† (1); Oct. 30† (2).
Edgecombe—Sept. 11 (1); Oct. 23 (1); Nov. 13† (2).
Martin—Sept. 18 (2); Dec. 11 (1).

THIRD JUDICIAL DISTRICT

Fall Term, 1922—*Judge Horton.*

Northampton—Aug. 7‡ (1); Oct. 30 (2).
Hertford—Aug. 7 (1); Oct. 16 (2).
Halifax—Aug. 14 (2); Nov. 27 (2).
Bertie—Aug. 28 (2); Nov. 13 (2).
Warren—Sept. 18 (2).
Vance—Oct. 2 (2).

FOURTH JUDICIAL DISTRICT

Fall Term, 1922—*Judge Allen.*

Lee—July 17 (2); Sept. 18† (1); Oct. 30 (1); Nov. 6† (1).
Chatham—July 31 (2); Oct. 23 (1)
Johnston—Aug. 14* (1); Sept. 25† (2); Dec. 11 (2).
Wayne—Aug. 21 (2); Oct. 9† (2); Nov. 27 (2).
Harnett—Sept. 4 (1); Sept. 11† (1); Nov. 13† (2).

FIFTH JUDICIAL DISTRICT

Fall Term, 1922—*Judge Calvert.*

Pitt—Aug. 21† (1); Aug. 28 (1); Sept. 11† (1); Sept. 25† (1); Oct. 23 (1); Oct. 30† (1).
Craven—Sept. 4* (1); Oct. 2† (2); Nov. 20† (2).
Carteret—Oct. 16 (1); Dec. 4 (1).
Pamlico—Nov. 6 (2).
Jones—Sept. 18 (1).
Greene—Dec. 11 (2).

SIXTH JUDICIAL DISTRICT

Fall Term, 1922—*Judge Cranmer.*

Onslow—July 17†; Oct. 9 (1); Nov. 20† (2); Dec. 4† (1).
Duplin—July 10* (1); Aug. 28† (2); Oct. 2* (1); Dec. 4† (2).
Sampson—Aug. 7 (2); Sept. 18† (2); Oct. 23 (2).
Lenoir—Aug. 21* (1); Oct. 16 (1); Nov. 6† (2); Dec. 11.*

SEVENTH JUDICIAL DISTRICT

Fall Term, 1922—*Judge Lyon.*

Wake—July 10*; Sept. 11* (1); Sept. 18† (2); Oct. 2† (1); Oct. 9* (1); Oct. 23† (2); Nov. 6* (1); Nov. 27† (2); Dec. 11*.
Franklin—Aug. 28† (2); Oct. 16* (1); Nov. 13† (2).

EIGHTH JUDICIAL DISTRICT

Fall Term, 1922—*Judge Devin.*

New Hanover—July 10*; Sept. 11* (1); Sept. 18† (1); Oct. 16† (2); Nov. 13* (1); Dec. 4† (2).
Pender—Sept. 25 (1); Oct. 30 (2).
Columbus—Aug. 21 (2); Nov. 20† (2).
Brunswick—Sept. 4 (1); Oct. 2.

NINTH JUDICIAL DISTRICT

Fall Term, 1922—*Judge Bond.*

Robeson—July 10*; Sept. 4† (2); Oct. 2* (2); Nov. 6†; Dec. 4† (2).
Bladen—Aug. 7*; Oct. 16† (1).
Hoke—Aug. 14 (2); Nov. 13.
Cumberland—Aug. 26* (1); Sept. 18† (2); Oct. 23† (2); Nov. 20.*

TENTH JUDICIAL DISTRICT

Fall Term, 1922—*Judge Connor.*

Granville—July 24; Nov. 13 (2).
Person—Aug. 14; Oct. 16.
Alamance—Aug. 21* (1); Sept. 11† (2); Nov. 27.*
Durham—Aug. 28*; Sept. 25† (2); Nov. 6† (1); Dec. 11.*
Orange—Sept. 4 (1); Dec. 4 (1).

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

Fall Term, 1922—*Judge Brock.*

Ashe—July 10 (2); Oct. 16* (1).
Forsyth—July 24* (2); Sept. 11† (2); Oct. 2 (2); Nov. 6† (2); Dec. 11.*
Rockingham—Aug. 7* (2); Nov. 20† (2).
Caswell—Aug. 21 (1); Dec. 4 (1).
Alleghany—Sept. 25 (1).
Surry—Aug. 28 (2); Oct. 23 (2).

TWELFTH JUDICIAL DISTRICT

Fall Term, 1922—*Judge Harding.*

Davidson—July 31 (2); Nov. 20 (2).
Guilford—Aug. 14* (1); Aug. 21†; Sept. 4† (2); Sept. 18†; Oct. 2*; Oct. 9† (2); Nov. 6† (2); Dec. 4† (1); Dec. 11* (1); Dec. 18.*
Stokes—July 17†; Oct. 23* (1); Oct. 30† (1).

THIRTEENTH JUDICIAL DISTRICT

Fall Term, 1922—*Judge Long.*

Stanly—July 10 (1); Oct. 9† (1); Nov. 20 (1).
Richmond—July 17† (1); July 24* (1); Sept. 4† (1); Oct. 2* (1); Nov. 6† (1); Dec. 4† (1).
Union—July 31*; Aug. 21† (2); Oct. 16 (1); Oct. 23† (1).
Anson—Sept. 11* (1); Sept. 25† (1); Nov. 13† (1).
Moore—Aug. 14* (1); Sept. 18† (1); Dec. 11†.
Scotland—Oct. 30; Nov. 27.

FOURTEENTH JUDICIAL DISTRICT

Fall Term, 1922—*Judge Webb.*

Mecklenburg—July 10* (2); Aug. 28* (1); Sept. 4† (2); Oct. 2* (1); Oct. 9† (2); Oct. 30† (2); Nov. 13* (1); Nov. 20† (2).
Gaston—Aug. 14† (1); Aug. 21* (1); Sept. 18† (2); Oct. 23* (1); Dec. 4† (2).

FIFTEENTH JUDICIAL DISTRICT

Fall Term, 1922—*Judge Finley.*

Montgomery—July 10 (1); Sept. 25† (1); Oct. 2 (1).
Randolph—July 17† (2); Sept. 4* (1); Oct. 30* (1); Dec. 4 (2).
Iredell—July 31 (2); Nov. 6 (2).
Cabarrus—Aug. 4 (3); Oct. 16 (2).
Rowan—Sept. 11 (2); Oct. 9† (1); Nov. 20 (2).

SIXTEENTH JUDICIAL DISTRICT

Fall Term, 1922—*Judge Ray.*

Catawba—July 3 (2); Sept. 4 (2); Nov. 27* (1).
Lincoln—July 17 (1); Oct. 16 (1); Oct. 23† (1).
Cleveland—July 24 (2); Oct. 30 (2).
Burke—Aug. 7 (2); Oct. 2 (2); Dec. 4† (2).
Caldwell—Aug. 21 (2); Nov. 13 (2).

SEVENTEENTH JUDICIAL DISTRICT

Fall Term, 1922—*Judge McElroy.*

Alexander—Sept. 18 (2).
Yadkin—Aug. 21 (1); Nov. 27 (1).
Wilkes—Aug. 7 (2); Oct. 2† (2).
Davie—Aug. 28 (1); Dec. 4†.
Watauga—Sept. 4 (2).
Mitchell—July 24† (1); Nov. 13 (2).
Avery—July 17 (1); Oct. 16 (2).

EIGHTEENTH JUDICIAL DISTRICT

Fall Term, 1922—*Judge Bryson.*

Transylvania—July 24 (2); Nov. 27 (3).
Henderson—Oct. 2 (2); Nov. 13† (2).
Rutherford—Aug. 21† (2); Oct. 30 (2).
McDowell—July 10 (2); Sept. 18 (2).
Yancey—Aug. 14†; Oct. 16 (2).
Polk—Sept. 4 (2).

NINETEENTH JUDICIAL DISTRICT

Fall Term, 1922—*Judge Lane.*

Buncombe—July 10 (3); Aug. 7† (3); Sept. 4 (3); Oct. 2† (3); Nov. 6 (3); Dec. 4† (3).
Madison—Aug. 28 (1); Sept. 25 (1); Oct. 23: Nov. 27 (1).

TWENTIETH JUDICIAL DISTRICT

Fall Term, 1922—*Judge Shaw.*

Haywood—July 17 (2); Sept. 18 (2).
Cherokee—Aug. 7 (2); Nov. 6 (2).
Jackson—Oct. 9 (2).
Swain—July 24 (2); Oct. 16 (2).
Graham—Sept. 4 (2).
Clay—Oct. 2 (1).
Macon—Aug. 14 (2); Nov. 20 (2).

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*Criminal cases. †Civil cases. ‡Civil and jail cases.

Compiled from the Court Calendar of A. B. Andrews of the Raleigh Bar.

UNITED STATES COURTS FOR NORTH CAROLINA

DISTRICT COURTS

Eastern District—HENRY G. CONNOR, *Judge*, Wilson.
Western District—JAMES E. BOYD, *Judge*, Greensboro
Western District—EDWIN YATES WEBB, *Judge*, Shelby.

EASTERN DISTRICT

Terms—District terms are held at the time and place as follows:

Raleigh, fourth Monday after fourth Monday in April and October. Civil terms, first Monday in March and September. S. A. ASHE, Clerk.

Elizabeth City, second Monday in April and October. J. P. THOMPSON, Deputy Clerk, Elizabeth City.

Washington, third Monday in April and October. ARTHUR MAYO, Deputy Clerk, Washington.

New Bern, fourth Monday in April and October. ALBERT T. WILLIS, Deputy Clerk, New Bern.

Wilmington, second Monday after the fourth Monday in April and October. C. M. SYMMES, Deputy Clerk, Wilmington.

Laurinburg, Monday before the last Monday in March and September.

Wilson, first Monday in April and October.

OFFICERS

E. F. AYDLETT, United States District Attorney, Elizabeth City.

C. E. THOMPSON, Assistant United States District Attorney, Elizabeth City.

M. B. SIMPSON, Assistant United States District Attorney, Elizabeth City.

G. H. BELLAMY, United States Marshal, Wilmington.

S. A. ASHE, Clerk United States District Court at Raleigh for the Eastern District of North Carolina, Raleigh.

WESTERN DISTRICT

Terms—District terms are held at the time and place as follows:

Greensboro, first Monday in June and December.

Statesville, third Monday in April and October.

Asheville, first Monday in May and November. W. S. HYAMS, Deputy Clerk, Asheville.

Charlotte, first Monday in April and October.

Salisbury, fourth Monday in April and October.

Wilkesboro, fourth Monday in May and November.

OFFICERS

STONEWALL J. DURHAM, United States District Attorney, Charlotte.

CLYDE R. HOEY, Assistant United States District Attorney, Charlotte.

CHARLES A. WEBB, United States Marshal, Asheville.

R. L. BLAYLOCK, Clerk United States District Court.

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1922

ELBERT G. WESTON v. ROYAL TYPEWRITER COMPANY.

(Filed 22 February, 1922.)

Evidence—Pleadings—Admissions.

Where the plaintiff has introduced in evidence allegations of the answer amounting to the admissions of distinct and separate facts relevant to the inquiry, it is not open to the defendant to put in evidence the remaining part of each paragraph, when they do not tend to explain or qualify the previous admissions. *Jones v. R. R.*, 176 N. C., 268, cited and applied.

APPEAL by defendant from *Horton, J.*, at December Term, 1921, of BEAUFORT.

Civil action to recover damages for an alleged breach of contract. Upon trial in the Superior Court, the jury returned the following verdict:

"1. Did defendant contract to sell and deliver typewriters to plaintiff, as alleged in the complaint? Answer: 'Yes.'

"2. If so, did defendant breach said contract, as alleged in the complaint? Answer: 'Yes.'

"3. Did plaintiff on his part fully perform said contract, and stand ready, able, and willing to perform same, as alleged in the complaint? Answer: 'Yes.'

"4. What damage, if any, is plaintiff entitled to recover of defendant on account of machines actually sold by plaintiff and not delivered by defendant? Answer: '40 per cent discount on 45 machines, at $40. Total, $1,800, and interest from 1 January, 1920.'

"5. What damage, if any, is plaintiff entitled to recover of defendant by reason of defendant's failure to ship machines ordered by plaintiff, but not actually sold by plaintiff. Answer: 'None.'"

Judgment on the verdict in favor of plaintiff; defendant appealed.

Small, MacLean, Bragaw & Rodman for plaintiff.
Wiley C. Rodman for defendant.

STACY, J. The exceptions relating to the existence and binding force of the contract are all settled by the verdict. The controversy in this regard was largely one of fact and the jury have found in accordance with the plaintiff's contention. The motion for judgment as of nonsuit was properly overruled.

Plaintiff offered in evidence certain admissions, taken from defendant's answer, of distinct, separate facts relevant to the inquiry, and no objection was made to this at the time. Later, defendant requested that it be allowed to put in evidence the remainder of each section of the answer from which plaintiff had offered separate and distinct admissions. Objection being made, the request was declined and the proposed evidence excluded. It does not appear that these portions of the different paragraphs tended to explain or to qualify the previous admissions; but, on the contrary, an examination shows the facts to be otherwise. Hence, the case falls outside of the rule laid down in *Jones v. R. R.*, 176 N. C., 268: "It is the settled rule of procedure in this jurisdiction that a party may offer in evidence a portion of his adversary's pleadings containing an allegation or admission of a distinct and separate fact relevant to the inquiry and without introducing qualifying or explanatory matter, the rule being further to the effect that in such case it is open to the opposing party to introduce such qualifying matter if he so desires." It should be observed, however, that the other portions of the pleadings become competent evidence for the pleader only when they tend to modify or limit the former allegations or admissions which have been offered by his adversary.

The remaining exceptions, even if valid, but which we do not find to be, are not of sufficient moment to warrant a new trial.

Having discovered no reversible error on the record, the verdict and judgment must be upheld.

No error.

SALLIE M. MASTERS AND HER HUSBAND v. J. F. RANDOLPH.

(Filed 22 February, 1922.)

Estates—Estates Tail—Children—Statutes—Fee—Wills.

A devise of land to testatrix's daughter "and her children," the daughter never having had children born to her, conveys an estate tail to the daughter, converted by the statute into a fee-simple title, which she may convey in fee. *Cole v. Thornton*, 180 N. C., 90, cited and applied.

APPEAL by defendant from *Daniels, J.*, at the January Term, 1922, of BEAUFORT.

Civil action, submitted and determined on case agreed.

The action is to recover the purchase price of a parcel of land, part of lot No. 31 in Pungo Town, Washington, N. C., plaintiffs having contracted to sell and "convey a good title to defendant." Recovery is resisted on the ground that *feme* plaintiff, and alleged owner, did not have a perfect title, and was therefore unable to comply with the contract of sale. Judgment for plaintiff, and defendant excepted and appealed.

Small, MacLean, Bragaw & Rodman for plaintiff.
Stewart & Bryan for defendant.

HOKE, J. The title offered is dependent upon the following facts, properly set forth in the case agreed:

The part of the lot in question, the subject-matter of the contract was owned by S. G. Myers, now deceased, who was the mother of *feme* plaintiff.

That said S. G. Myers died, leaving a last will and testament duly executed and proved and recorded, and in which she made disposition of the property in terms as follows: "I give to my daughter, S. G. H. Myers (now Masters, and *feme* plaintiff), and her children, the house and lot, also the furniture in the house on the premises known as lot 31, Pungo Town, in the town of Washington, N. C."

That said Sallie M. Masters was at the time of the execution and probating of said will unmarried, and that she does not now have and has never had any children.

Upon these, the pertinent facts on the question presented, our decisions clearly hold that the *feme* plaintiff, Sallie M. Masters, is the absolute owner in fee of the property, and the judgment of his Honor enforcing compliance with the contract is affirmed. See *Cole v. Thornton*, 180 N. C., 90; *Moore v. Leach*, 50 N. C., 88, and cases cited.

In *Cole's case, supra,* the controlling principle is stated as follows: "An estate to testator's wife for life, then to their named daughter and her children, if any, but should the latter die leaving no children, then to the heirs at law of testator's wife. The wife being dead, and the daughter being her only heir, and there never having been children born of the daughter, the latter takes an estate tail converted by the statute into a fee-simple title."

Affirmed.

IN RE WILL OF D. B. BRADFORD.

(Filed 22 February, 1922.)

1. **Wills—Caveat—Marriage—Statutes—Undue Influence—Evidence.**

   Our statute revokes any will made before marriage, and evidence that a will had been made prior thereto is not evidence of undue influence in the procurement of a subsequent will made in favor of the wife of the deceased. C. S., 4134.

2. **Wills—Caveat—Widow—Undue Influence—Evidence.**

   Evidence that the widow left the State after the death of her husband, under whose will she was a beneficiary, does not tend to show undue influence on her part; and where the jury has accepted her explanation thereof, the caveators cannot successfully complain of prejudicial error.

3. **Evidence — Deceased Persons — Statutes— Wills—Undue Influence—Transactions and Communications.**

   The wife may testify that she was not aware that her deceased husband had made a will until after his death, as substantive evidence, and it is not objectionable under our statute as being of a transaction with a deceased person. C. S., 1795.

4. **Same—Third Persons.**

   Where the will of the deceased husband in favor of his wife is contested, she may testify as a substantive, independent fact, not prohibited by our statute, that excluding any dealings with her husband, she had nothing to do with his making the will, it being in effect that she did not procure it through third parties, though this may indirectly tend to prove a transaction with the deceased. C. S., 1795.

5. **Wills—Caveat—Undue Influence—Husband and Wife—Disparity in Ages—Intent.**

   Great disparity of age between the deceased husband and his second wife, who benefited by his will, sought to be set aside for her undue influence, and declarations of the former deceased wife that in appreciation of the kindness of the propounder, whom he afterwards married, they desired to adopt her, or that after her apprehended death the husband should marry her, is not evidence that the second wife procured the will through undue influence.

6. Wills—Husband and Wife—Undue Influence—Evidence.

The mere fact that the deceased husband had left a will bequeathing a large proportion of his estate to his wife, will not be considered as evidence that she exerted undue influence over him in the making of the will.

APPEAL by caveators from *Horton, J.,* at November Term, 1921, of PASQUOTANK.

D. B. Bradford died in Elizabeth City, November, 1918. His wife, aged 79, predeceased him in December, 1916, leaving no children. After his wife's death, he lived with his nephew, J. B. Griggs, but after a few months he married Minerva I. Cross, a trained nurse, aged 23. At his death, he left surviving him his widow, the propounder, Minerva I. Bradford; Dr. J. B. Griggs, J. B. Fearing, and Mary Whitehurst, children of two deceased sisters; and D. B. Fearing, Keith and Woodson Fearing, grandchildren of one of his deceased sisters, as his heirs at law. A year after his second marriage he executed this will, the principal bequests in which are that he bequeathed a fund to erect a handsome monument to the memory of his first wife, and $6,000 to the Episcopal Church towards building a parish house to the memory of said first wife and her mother; and gave to his nephews and nieces (together with previous property) $25,000. He also bequeathed $500 to the Masonic order, and the rest of his estate he bequeathed to his widow (naming the items), excepting certain valuable real estate, devised to his heirs at law and to the heirs of his first wife.

The only issue raised, and submitted to the jury upon the evidence, is the following: "Was the execution of the paper-writing purporting to be the last will and testament of D. B. Bradford as to the devises and bequests therein to Minerva I. Bradford procured by the fraud and undue influence of said Minerva I. Bradford, as alleged?" to which the jury responded, "No." Judgment accordingly; appeal by caveators.

Aydlett & Simpson and Meekins & McMullan for caveators.

Thompson & Wilson, S. C. Bragaw, and Ehringhaus & Small for propounder.

CLARK, C. J. There is no allegation of any undue influence as to any of the other devises and bequests in said will nor as to the mental capacity of the testator, the sole question raised by caveators, his heirs at law, being as to the undue influence alleged to have been exerted by his wife.

Our statute, C. S., 4134, revokes any will made prior to the marriage, and the testimony of the existence of such previous will cannot be therefore considered as evidence of undue influence. *Means v. Ury,* 141 N. C., 248.

Indeed, on a review of the evidence in this controversy, the judge might almost have been justified in directing the jury to find that there was no evidence of undue influence by the propounder. In this record there is no evidence that even a single time she ever mentioned the making of the will to him. The will was executed one year after his marriage to his second wife, and on the anniversary of their wedding, without any evidence of a knowledge thereof by her at the time of its being made. He died in November following.

The exceptions may be briefly considered: The first exception was to the court's refusal to admit the caveators to show that shortly after the death of her husband, Mrs. Bradford left Elizabeth City and has since resided in another state. She accounted for this, on cross-examination, by stating that shortly after her husband's death she received a telegram announcing her mother's death, and left to be with her father in New York City, and has been with him ever since, except in this trial and on occasional visits here. The caveators have had the benefit, if there was any, of the testimony which they sought to elicit.

The second exception is to the exclusion of testimony that the morning after her husband's funeral the widow, at that time in conversation with her brother-in-law, declined to be disturbed.

In response to an inquiry, Mrs. Bradford testified that "independent of any relationship with Mr. Bradford, she had nothing to do with preparing the will, and that the first time she even saw it was after his death." The question as asked and answered carefully excluded anything which grew out of any transaction between the testator and the witness. It was entirely competent for her to say that the first time she saw the will was after the death of her husband. This certainly was not a transaction with the deceased, and she could properly testify to this as a substantive independent fact. *Lane v. Rogers*, 113 N. C., 171, and citations thereto in the 2d Anno. Ed. It was an independent fact, which did not involve any dealing with her husband. *Watts v. Warren*, 108 N. C., 514.

Her statement that "excluding any relationship with Mr. Bradford (which means excluding any dealings with Mr. Bradford) she had nothing to do with preparing the will," was simply a declaration that she did not do this through third parties, and the authorities are uniform that a witness may testify to a substantive, independent fact, even though this may indirectly tend to prove a transaction with the deceased. *Grandy v. Sawyer*, 113 N. C., 42; *Cornelius v. Brawley*, 109 N. C., 542. In this latter case the widow and devisee proved the finding of the will among the valuable papers.

Besides this, the same witness testified to the same facts later without objection. Her testimony that after the testator's death "I did not go to the bank to get the will; I did not see it until after Mr. Bradford's death" was competent.

Exceptions 6 and 7 are to the testimony of Miss Edna F. Cox, a sister of Mrs. Bradford, to statements made by the first Mrs. Bradford in the presence and hearing of Mrs. Bradford regarding their wishes to adopt the propounder as their daughter in appreciation of kindness to them both, and that if that was not possible, that the propounder, after the wife's death (she being then in the hospital), should marry the testator. The caveators insist that (by reason of the disparity of their ages) the marriage between the propounder and the testator was an unnatural one, but this is not a proposition of law, and certainly, standing alone, as it did, it could not be considered as evidence of undue influence of the propounder in procuring the marriage, and, beyond question, it would not tend to show that by undue influence she procured the execution of this will a year after the marriage. The mere fact that a husband bequeaths, as in this case, a large proportion of his property to his wife is not evidence that she exerted undue influence in procurement of the same. *In re Peterson,* 136 N. C., 13; *In re Cooper,* 166 N. C., 210.

In this case the sanity and mental capacity of the testator are not denied; nor that he was an experienced and active business man; that every line of the will is in his own handwriting; that it was duly witnessed at his bank, and had been filed for months in his private deposit box in the bank, which he visited almost every day, and from which he had constant opportunity to remove and destroy it if so inclined.

After a full and careful scrutiny of the record and all the exceptions, we do not see that the caveators have been in any wise prejudiced in the conduct of the cause by any ruling of his Honor.

No error.

W. T. HUSSEY ET AL., TRADING AS ENTERPRISE CARRIAGE COMPANY, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 22 February, 1922.)

1. **Appeal and Error—Courts—Verdict Set Aside on One Issue.**

When it appears from the evidence, the charge of the court, and the verdict that the jury has committed a palpable error in the answer to one of the issues, it is the duty of the trial judge to set it aside to prevent a miscarriage of justice.

2. **Same—Railroads—Damages—Penalties—Statutes—New Trials.**

In an action against a railroad company to recover damages to a shipment of goods and the penalty for the failure of defendant to pay the same within 90 days, as allowed by C. S., 3524, the issues raised are entirely separate and distinct from each other, and the trial judge may set aside the verdict on the second issue, and retain that on the first one, for a retrial.

3. **Same—Evidence—Instructions—Questions of Law.**

In the plaintiff's action to recover damages against a railroad company to a shipment of goods and a penalty for the failure of the defendant to pay the claim for 90 days, C. S., 3524, and the evidence tends only to sustain the plaintiff's demand, on both issues, the judge may retain the verdict on the issue of damages answered in plaintiff's favor, set aside the verdict on the second issue denying recovery of the penalty, and on the retrial of the second issue direct a verdict thereupon, on the same evidence, in plaintiff's favor. *Semble*, the court could have so answered this issue as a matter of law on the first trial.

4. **Appeal and Error—Fragmentary Appeals—Separate Issues—Judgment—Verdict.**

Where the trial judge has set aside the verdict on one of the issues submitted, and after the retrial on the second issue appeal has been taken from a judgment on the whole case, it does not come within the objection under the decision of *Cement Co. v. Phillips*, 182 N. C., 440.

APPEAL from *Allen, J.*, at November Term, 1921, of EDGECOMBE.

Don Gilliam for plaintiffs.
Bridgers & Bourne for defendant.

CLARK, C. J. This was an action, begun before a justice of the peace, to recover damages to shipment of freight, amounting to $66.20, with interest from 20 May, 1920, and for the penalty of $50 for delay of more than 90 days after filing claim to pay the same, imposed by law. C. S., 3524. Judgment was rendered for said amounts. On appeal, the evidence was that two barrels of oil, costing $64.94, plus freight ($1.36), was shipped 23 April, 1920, from Rocky Mount to Tarboro; that when it arrived there was a loss as above stated, and the plaintiff filed a claim in writing for $66.20, on 20 May, 1920; that payment not having been made, this action was begun 23 June, 1921. The plaintiff introduced two witnesses to the above effect. The defendant offered no evidence, and upon the charge of the court, to which there was no exception, the jury returned a verdict on the first issue: "$66.20, amount of claim."

As to the second issue, the court instructed the jury that if they found the amount of damages to be less than the amount claimed to answer—"Nothing," but if they found the amount to be that of the claim to answer "$50," the penalty allowed by law. It was not denied that the claim had remained unpaid more than a year after it was filed with the defendant.

The jury having answered the second issue as to the penalty "No penalty," the court set aside the verdict and directed the case to be tried by a jury as to that issue. The court instructed the jury that if they believed the evidence, which was the same as above set out, to answer the issue as to the penalty $50, and the jury responded accordingly.

The defendant excepted to setting aside the verdict on the second issue, and that the court erred in instructing the jury on the second trial of that issue that if they believed the evidence to answer the issue, "The penalty $50."

There was no error in either particular. The jury having committed a palpable error in response to the second issue, it was the duty of the judge to set aside the verdict on that issue to prevent a miscarriage of justice. In *Benton v. Collins,* 125 N. C., 90, the Court said: "On the question as to the power of the Superior Court to grant new trials on one or more of several issues, and to let the others stand, and the practice of this Court to order new trials on particular or restricted issues, the authorities are numerous, and cover a long series of years. The following are some of them": (Here followed a long list of authorities), adding: "Before such partial new trial, however, is granted, it should clearly appear that the matter involved is entirely distinct and separable from the matters involved in the other issues, and that the new trial can be had without danger of complication with other matters."

In this case the penalty was an entirely separate and distinct matter, and the jury having found the amount of the damages to be as claimed, the penalty followed as a matter of law. C. S., 3524, and upon the finding of the first issue the judge might have added the penalty of the judgment as a matter of law. It was unnecessary to submit the issue again to a jury, but the defendants cannot complain of this, and the jury, upon the same evidence, answered the issue $50.

In *Sumrell v. R. R.*, 152 N. C., 269, the Court held that in an action of this kind, when the finding of the jury is "for the full amount of the damages, the plaintiff is entitled to recover the penalty." The right to the penalty attached automatically upon this finding on the first issue, and judgment could have been rendered by the court for the penalty as a matter of law, without submitting the issue to the jury.

The case does not come up on the two separate appeals, which we condemned in *Cement Co. v. Phillips,* 182 N. C., 440, citing *Joyner v. Reflector Co.,* 176 N. C., 277, and other cases, but the court properly rendered a judgment upon the whole case, and we find

No error.

THE CONTINENTAL JEWELRY COMPANY v. E. T. STANFIELD AND B. A. STEADMAN, TRADING AS STANFIELD & STEADMAN.

(Filed 22 February, 1922.)

1. **Vendor and Purchaser—Sale—Implied Warranty.**

   Where goods are sold without inspection the vendor impliedly warrants them to be at least merchantable.

2. **Same—Express Warranty—Contracts—Worthless Articles—Exchange—Consideration.**

   Upon the sale of jewelry by sample with a written warranty that should any of the articles purchased fail to give absolute satisfaction to the user, the vendor would furnish new duplicate articles, upon their return, at his expense, the law will imply a warranty that they are merchantable or of some value; and where they are worthless, an exchange of like kind and quality would be of no benefit to the purchaser, and without consideration for their price, and he may recover without having complied with the terms of the warranty.

3. **Same—Instructions—Verdict Directing.**

   Where, notwithstanding a warranty in the sale of jewelry that they should be returned and exchanged for others of like kind and quality, there is evidence tending to show that the articles were absolutely worthless, the failure of the purchaser to offer them in exchange will not warrant the trial judge in directing a verdict for the vendor, and the issue should be submitted to the jury with proper instructions.

APPEAL by defendants from *Allen, J.*, at September Term, 1921, of EDGECOMBE.

This action began before a justice of the peace to recover $192 and interest for jewelry purchased from the plaintiff. The plaintiff introduced an itemized and verified statement of account for $192; the defendants admitted that they bought some jewelry from the defendant company and signed contract for it; that three or four weeks after receiving the jewelry it all turned out to be brass and not merchantable; that every piece they sold was brought back; that it was of no value, and they returned all of it to the plaintiff company by express after a lapse of probably ninety days. The defendants further testified that the stuff was wholly worthless and not salable; that the goods were reshipped to the plaintiffs, and have never been returned to them. The plaintiff testified that it directed the goods to be shipped back to the defendants, who in turn denied they have received them.

The defendants asked the court to instruct the jury that (1) if the goods were not of the kind specified in the contract, that is, that the jewelry was not gold plated, or rolled gold plate or solid gold, and the jewelry sent was all brass, then the defendants had the right to return the same, and are not liable for the goods returned.

(2) That if the jury find by the greater weight of the evidence that the jewelry was not merchantable, but was unsalable and worthless, the defendants had the right to return the same, and are not liable for the goods returned.

(3) That if the jury find by the greater weight of the evidence that the goods were returned by defendants to plaintiff and kept by it, then the defendants are not liable for the goods returned.

These prayers were refused, and the defendants excepted, and the court instructed the jury if they believed all of the evidence in the case, as a matter of law the plaintiff is entitled to recover, and to answer the issue, "$192, and interest." The jury so responded, and from the judgment entered the defendants appealed.

H. D. Hardison and G. M. T. Fountain for plaintiff.
W. O. Howard for defendant.

CLARK, C. J. The plaintiff relies upon the contract which contains a provision, "Should any article purchased from us fail to give absolute satisfaction to the user, it must be promptly returned to us, and we will furnish free a new duplicate article, and return it at our expense." But we think that if the articles were brass and not merchantable and of no value, as the defendants testified, to receive a "duplicate" thereof would have been no benefit to the defendants, and such provision would not be a defense to the plaintiff. The defendants were entitled to have the issue submitted to the jury upon that allegation, and the second prayer of the defendants should have been given. If the jury had found that "the jewelry" was "not merchantable, was unsalable, and wholly worthless," the defendants had the right to return the same, and are not liable for the goods returned, and it was also error for the court to instruct the jury that if they "believed all the evidence in the case, as a matter of law, the plaintiff is entitled to recover, and to answer the issue '$192, and interest.' "

If, as a matter of fact, the goods were worthless and unmerchantable, the provisions in the contract that the defendants might return any of it and receive another or other articles of the same grade was no warranty at all, except in form, and there was a total failure of consideration. These goods having been sold without opportunity for inspection, there was an implied warranty that they should be at least merchantable. *Main v. Field,* 144 N. C., 310; *Medicine Co. v. Davenport,* 163 N. C., 294; *Asheford v. Shrader Co.,* 167 N. C., 45.

The issues of fact arising upon the evidence, there being no pleadings in this case begun before a justice of the peace, should have been submitted to the jury upon proper instructions.

New trial.

W. B. WATTS ET AL. V. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 22 February, 1922.)

1. **Carriers—Railroads—Action—Consignee.**

The consignees of a shipment by common carrier are ordinarily the ones for whose benefit it was made and are entitled to maintain an action upon the contract, the question of title being dependent upon the intention of the parties.

2. **Same—Order, Notify—Statutes.**

The person to be notified on shipment to order of consignor has, under our statute, C. S., 313, title for the purpose of a suit to recover damages and the statutory penalty, as fully as if the carrier had contracted with him direct, upon the presentation of the bill of lading properly endorsed and his tender thereof in good faith to the carrier, the statute being remedial of the common law that there was no contractual relation between him and the carrier that would permit recovery for causes accruing before he had paid the draft, and had the bill of lading assigned to him. C. S., 290, 337.

APPEAL by plaintiffs from *Ferguson, J.*, at November Special Term, 1921, of WASHINGTON.

In July, 1920, the plaintiffs bought certain articles from the Farm Equipment Company of Raleigh, which delivered them to the defendant company at Raleigh for transportation to Plymouth, and issued its bill of lading to vendor. The shipment was made "Order, notify," and the Farm Equipment Company attached a sight draft to the bill of lading and forwarded the same through the banks in the usual course of business. Plaintiffs were notified by defendant of the arrival of the shipment, and one of plaintiffs proceeded to the station of the defendant to obtain said property; on his way down he stopped at the bank, paid draft in full, and securing the bill of lading, demanded the property from the defendant. When the car containing the shipment was opened it was discovered that certain of the batteries had been broken and destroyed. The agent of the defendant then and there told the plaintiffs to take the said batteries and keep the same subject to the order of the defendant company, thereby recognizing, as the plaintiffs claim, the responsibility of the defendant to the plaintiffs for the same. The plaintiffs filed their claim with the defendant as required by the bill of lading, and instituted this action to recover their damages on failure of the defendant to pay the same. At the conclusion of the evidence for the plaintiffs, the court directed a nonsuit, and the plaintiffs appealed.

W. L. Whitley for plaintiffs.
Small, MacLean, Bragaw & Rodman for defendant.

CLARK, C. J. The contract of shipment in this case was made for the benefit of the plaintiffs, and they were entitled to maintain an action upon the same. *Nicholson v. Dover,* 145 N. C., 18; *Woodard v. Stieff,* 171 N. C., 83, and numerous other cases, and it is elementary that the passing of title in sales depends upon the intention of the parties. *Teague v. Grocery Co.,* 175 N. C., 195; 35 Cyc., 277.

The trial judge seems to have followed the decision in *Mfg. Co. v. R. R.,* 149 N. C., 261, in granting the motion to nonsuit, which held that there was "no contractual relation between the carrier and the payee on a draft with bill of lading attached when the shipment is made 'Order, notify,' and that the title does not pass until the draft is paid and the payee cannot recover damages to shipment sustained prior to that time nor the penalty for delay in transit." But since the decision in that case, the law has been changed by legislative enactment. C. S., 290: "A carrier, in the absence of some lawful excuse, is bound to deliver goods upon a demand made either by the consignee, named in the bill for the goods, or, if the bill is an order bill, by the holder thereof, if such demand is accompanied by: . . . (2) Possession of the bill of lading and an offer in good faith to surrender, properly endorsed, the bill which was issued for the goods if the bill is an order bill." It appears from the record that the plaintiffs fully complied with every requirement of this act. They had the bill properly endorsed, to which was attached at the time the paid sight draft, and they paid the freight charges demanded by the defendant, and the signed receipt for the goods delivered, the agent of the defendant noting thereon the damage.

C. S., 313, is as follows: "A person to whom an order bill has been duly negotiated, acquires thereby: (1) Such title to the goods as the person negotiating the bill to him had, or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the consignee and consignor had, or had power to convey to the purchaser in good faith for value; and (2) *the direct obligation to the carrier to hold possession of the goods for him according to the terms of the bill as fully as if the carrier had contracted direct with him.*"

The plaintiffs, under this statute, by payment of the draft and the delivery to them of the attached bill of lading, were entitled to all the property called for in the bill of lading, and, in the event of a failure to deliver, to recover full compensation from the carrier, as complete as the consignor could have recovered had he remained the consignee.

C. S., 377, provides: "The endorsement of a bill shall not make the endorser liable for *any failure on the part of the carrier* or previous endorser of the bill to *fulfill their respective obligations.*" Our statute, as above, is practically the same as the Federal Bills of Lading Act of 29 August, 1916, as set out in the Federal Supp., 1918, 2d Ed., 72 *et seq.*

Formerly the consignor alone could recover for damages sustained by goods in transit or the penalty for delay unless the consignment was made in the name of the consignee. The assignee of an "Order, notify" was only entitled to the goods in the condition that they were in when the assignment was made. This was an injustice for the consignor, after receiving payment of the draft attached, had no inducement to sue for damages to the goods, or the penalty for the delay in transportation and the payer of the draft who suffered the loss from such damage and delay was without remedy. This was remedied by the above statute, which placed the assignee of such bill of lading, on payment of the draft attached, in the same status, with the same right to recover such damages to the goods and for any penalties and subject to the same defenses as formerly the consignor held in regard to such shipments. The judgment of nonsuit should be

Reversed.

CITY OF KINSTON v. ATLANTIC AND NORTH CAROLINA RAILROAD COMPANY AND NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 22 February, 1922.)

1. **Cities and Towns—Railroads—Street Improvements—Assessments—Railroads—Statutes—Municipal Corporations.**

The property of railroad companies abutting upon the streets of a city is liable to assessments for the paving and improvements thereon to the same extent as that of private owners, in proper instances, and where proper legislative authority is therefor shown.

2. **Same—Benefits—Necessity of Improvements.**

Where an act allows assessments to be made by a city on property abutting on a street for pavements or improvements thereon, the legislative declaration on the subject is conclusive as to the necessity and benefit of the proposed improvements, and in applying the principle and estimating the amount as against the owners, individual or corporate, the court may interfere only in case of palpable and gross abuse.

3. **Same—Constitutional Law—Necessaries—Elections.**

A city, authorized under a private act to issue bonds for street pavements and improvements and to assess the lands of owners abutting on the streets improved upon the approval of its voters, issued the bonds, assessed the owners accordingly, and finding it had insufficient funds, proceeded, under the provisions of C. S., 2703, 2704, to assess the lands of a railroad company abutting upon streets paved and improved for its proportional part of the cost in accordance with the method prescribed by the statutes: *Held*, the general statutes expressly included railroads within its provisions as to assessments, the only question involved, and improvements of this character coming within the definition of "necessaries," the assessments made under the general law against the abutting land of the railroad company are valid and enforceable; especially, as in this case, where the railroad company has acquired the fee-simple title to the land.

4. Same—Private Acts.

The general statutes authorizing cities and towns to issue bonds and assess abutting lands for improving and paving streets, and not requiring that the questions be submitted to the voters, are additional and independent of special or local laws (C. S., 2704), and where the latter require the question to be first submitted to the voters for their approval, and these requirements have been fully met, under the private act, the transactions thereunder complete and their validity unquestioned, a railroad company may not resist an assessment made under the general law, C. S., 2703, 2704, upon the ground that the provisions of the private acts, requiring the approval of the voters, control the question of the validity of the assessments. *Bramham v. Durham*, 171 N. C., 196, cited and distinguished.

5. Same—Ratifying Statutes.

Where a city or town has proceeded under private acts to issue bonds and assess the lands of abutting owners for street paving and improvements, and for insufficiency of funds thus expended find it necessary to assess the lands of a railroad company abutting on streets so improved, C. S., 2703, 2704, a later act ratifying the private acts, evidently for the purpose of curing apprehended defects and to make the bonds a more safe and desirable investment, cannot affect the validity of the proceedings under the general laws.

6. Courts—Judicial Notice—Railroads—Leases.

The question of primary and secondary liability for assessments for street paving and improvements between the defendants in this action being presented, depending upon an interpretation of a lease given by the State of its railroad property to the defendant's predecessor lessee, which has been several times before this Court in former litigation, the Court supplies the date and duration of this lease, which is important in the decision of the question, and which has been omitted from the record, it being for 91 years and 4 months from 1 September, 1904.

7. Cities and Towns—Municipal Corporations—Railroads—Leases—Assessments—Street Improvements—Primary and Secondary Liability.

While local assessments of abutting land upon city streets for paving and improvements are not regarded as taxes in the sense of a general revenue measure, they are referred to the power of taxation possessed and exercised by Government and held to be a special tax. Hence, where a railroad company has leased a railroad for 99 years, and has subleased it to another, and the lessee road has covenanted to protect the lessor "from payment of taxes of any nature whatsoever," *it is held*, while both of the railroad companies are liable for the assessment, that of the lessor is a primary one, though a covenant against assessments of this character has not specifically been made.

8. Cities and Towns — Municipal Corporations — Leases — Lessor and Lessee—Street Improvements—Assessments—Liens—Priority of Lien.

It is within the authority of the Legislature to make assessments against the lands of a railroad company abutting on streets improved by a city a paramount lien on its franchise and property, not requiring that such lien be given in express terms if by correct interpretation the statute intends that it shall be conferred, and when so conferred, the lien will necessarily be construed as being superior to all others.

9. Cities and Towns—Municipal Corporations—Assessments—Liens—Priorities of Liens—Taxes—Foreclosure—Actions—Statutes.

Where private acts of a Legislature gives a city the right to enforce assessments on lands abutting upon its improved streets as a lien against the property; and the city has, independently, under the general law, assessed the abutting land of a railroad company and its franchise, C. S., 2717, providing that if the "lien is not paid when due it shall be subject to the penalties now provided as in case of unpaid taxes": *Held*, the lien so created is superior to all other liens and encumbrances, and may be enforced by decree of sale of the property and franchise of the railroad company. C. S., 3462, 3463.

10. Cities and Towns—Municipal Corporations—Street Improvements—Statutes—Assessments—Priorities.

The provisions of C. S., 2713, that assessments made against abutting lands on streets paved or improved, shall be "from the time of the assessment and confirmation thereof, a lien superior to any and all liens and encumbrances," does not exclusively refer to subsequent liens; and the reference to the date of confirmation is only to fix the time when the lien is conclusively established, and when so established it takes the precedence over all liens then existent or otherwise.

APPEAL by both plaintiff and defendants from *Bond, J.*, at Fall Term, 1921, of LENOIR.

Civil action, heard on case agreed.

From the facts presented it appears that the Atlantic and North Carolina Railroad is a corporation owning a railroad franchise and property, etc., which extends through the city of Kinston, and the codefendant is in possession of and operating the same under a lease of 91 years and 4 months from and after 1 September, 1904, same having been made by the Atlantic and North Carolina Railroad to one Howland and acquired and held by the Norfolk Southern Railroad. That several of the streets of plaintiff cross the road and tracks of these companies at right angles and somewhat less, and that the said city, claiming to act under proper statutory authority, had entered in an extensive improvement of said streets, paving, etc., and have assessed a proportionate part of the cost against the defendants as abutting owners, and the action is to collect said amount from said companies by foreclosure of the alleged lien on the franchise and property of the companies and a judicial sale of same. There was denial of liability by both defendants, and a question presented, also, of primary and secondary liability of the two companies in case collection of said assessment should be successfully enforced.

Upon the case submitted, the court entered the following judgment:

This case coming on to be heard upon the facts agreed and contentions of the parties signed by counsel and filed with the record, upon consideration of said facts agreed and the contention of the parties, and after hearing argument of counsel, it is now considered, ordered, and adjudged that the said assessments, and each of them, which were levied under ch. 202, Private Laws of 1913, were duly and legally levied and constitute a lien upon the property of the defendants as is contemplated in and by ch. 202 of the Private Laws of 1913, but that such lien is subject to the right, privilege, and easement of the defendants and their successors as common carriers to continue to use the said property for rights-of-way purposes, and for all other rights and purposes requisite and needful to the defendants and each of them in the performance of their duties as common carriers, embracing within this exemption from lien the depots, freight and passenger, of the defendants, and all equipment and property of every kind incident to and necessary to the performance of their duties and carrying on of the business of common carrier.

It is further ordered, considered, and adjudged that the assessments and each of them which were levied under ch. 56 of the Public Laws of 1915 were duly and legally levied, and constitute a lien upon the property of the defendants as is contemplated in and by ch. 56 of the Public Laws of 1915, but that such lien is subject to the right, privilege, and easement of the defendants and their successors as common carriers to continue to use the said property for rights-of-way purposes, and for all other rights and purposes requisite and needful to the defendants and each of them in the performance of their duties as common carriers, embracing within this exemption from lien the depots, freight and passenger, of the defendants, and all equipment and property of every kind incident to and necessary to the performance of their duties and carrying on of the business of common carriers: *Provided,* that the triangular lot of land lying between the right of way of the defendant Atlantic and North Carolina Railroad Company and the Atlantic Coast Line Railroad Company and on the south side of Caswell Street, with a frontage of 321.9 feet, shall not be subject to the exemption from lien as hereinbefore provided.

It is further ordered and adjudged that the costs of the proceeding be paid by the defendants.

Both plaintiff and defendants appealed, assigning errors.

Dawson, Manning & Wallace for plaintiff.

W. F. Evans for defendant Atlantic and North Carolina Railroad Company.

Rouse & Rouse for defendant Norfolk Southern Railroad Company.

DEFENDANTS' APPEAL

HOKE, J. As the court understands, it is not contended by appellant that the assessments in this instance are irregular as a matter of form, nor that the amount is excessive, but defendants object to the validity of the claim on the ground of lack of power in the city, statutory or otherwise, to make any assessments of this kind against defendant companies. First, because railroad companies do not come within the principle permitting assessments for local improvements against abutting owners. There is strong diversity of opinion on this question, but the decisions in this State, and they are in accord, we think, with the better considered cases elsewhere on the subject, are in favor of upholding such assessments in proper instances, and where proper legislative authority therefor is shown. *Durham v. Public Service Co.,* 182 N. C., 333; *New Bern v. R. R.,* 159 N. C., 542; *Comrs. v. R. R.,* 133 N. C., 216; *Cicero v. City of Chicago,* 176 Ill., 501; *Northern Pacific Ry. Co. v. Seattle,* 46 Wash., 647; *Sheley v. Detroit,* 45 Mich., 431; *L. & N. R. R. Co. v. Barber Asphalt Co.,* 197 U. S., 430; *Northern Indiana R. R. Co. v. Connely,* 10 Ohio St., 159, and these and other decisions on the subject here and elsewhere are to the effect, further, both as to railroads and other abutting owners, that the legislative declaration on the subject is conclusive as to necessity and benefit of the proposed improvements, and in applying the principle and estimating the amount as against the owners, individual or corporate, the court may interfere only in case of palpable and gross abuse. *Felmet v. Canton,* 177 N. C., 52; *Justice v. Asheville,* 161 N. C., 62; *Tarboro v. Staton,* 156 N. C., 504-509; *Milwaukee, etc., Ry. v. Wisconsin,* 252 U. S., 100; *French v. Barber Asphalt Co.,* 161 U. S., 324. And in the present case, as stated, there is no claim of abuse or oppression as to the amount assessed against the defendants or their property. Defendants except further that there is an entire lack of statutory authority for making the assessments which the action seeks to enforce. The facts show that a part of the assessments against defendants were for improvements made under a statute applicable to the city of Kinston, Private Laws 1913, ch. 202. In that statute the city was authorized, on approval by popular vote provided for in the act, to issue coupon bonds to the amount of $100,000 in order to provide funds to pave generally and to improve the streets, to enlarge and extend its water-works and sewerage system, to enlarge and better equip its electric light plant, install a fire-alarm, etc. The act further authorizes the mayor or council to pave, macadamize streets, sidewalks, and assess the amount, not to exceed one-third cost, against abutting owners of real estate on either side of the street according to frontage, and that such assessment shall be a lien on said real estate payable in equal installments. It is further provided that the right to pave and improve and assess abutting owners is extended to and includes all the streets of the city of Kinston, and the municipal government is further vested with all the powers conferred upon the city government by ch. 338, Private Laws 1905, in reference to assessing owners and collecting same. Referring to the act of 1905, so incorporated, we find in section 9 that the assessment is declared a lien on the property of abutting owners, payable in equal installments, that on failure to pay either, the entire amount shall become due and enforceable against the property on which lien is declared by suit in Superior Court at the instance of the city. In reference to this matter, the case agreed states further that pursuant to this chapter an election was held, the bond issue authorized, the bonds sold, and the money expended on the designated subjects, and there not being sufficient amount to pay for the assessments made, the municipal authorities, without an election, made an additional issue of bonds for $50,000, which were sold and proceeds applied to payment of these improvements, for which a part of the present claim is made. It further appears that the Legislature, Private Laws 1915, ch. 319, passed an act validating any proceedings relative to issue and sale of the $100,000 bonds, which had been made and expended under the former statute. The claim for improvements under the statute, to our minds, is put beyond question by a further finding that defendant companies, by virtue of a deed from the original owner, have the title in fee for the land on which their railroad lies in the city of Kinston, and covering all the right of way except an inconsiderable portion of the amount, probably at one of the crossings, and this undoubtedly constituted defendants the owners for all purposes of all lands covered by the right of way, including that part of it abutting on either side of these intersecting streets.

In *Northern Pacific Railroad v. Seattle, supra,* it was held, among other things, "That abutting property cannot be released from the burdens of an assessment simply because the owner had seen fit to devote it to a use which may not be benefited by the local improvement." And in reference to the claims for improvements made and assessed under the general municipal act of 1915, appearing in C. S., ch. 56, art. 9, sec. 2703 *et seq.* This statute gives in explicit terms authority to municipal governments to assess abutting owners for street improvements, especially referring to railroads, providing that such claims shall constitute a lien on the property and franchise of the company, etc. The public acts contain, also, provisions as follows, C. S., 2704: "This article shall apply to all municipalities. It shall not, however, repeal any special or local law, or affect any proceedings under any special or local law for the making of street, sidewalk, or other improvements hereby authorized, or for the raising of funds therefor, but shall be deemed to be additional and independent legislation for such purposes and to provide an alternative method of procedure for such purposes, and to be a complete act, not subject to any limitation or restriction contained in any other public or private law or laws, except as herein otherwise provided." There is no question presented in this suit as to the validity of the $100,000, or of the $50,000 additional bonds sold by the city authorities, or any other issue. The claim is for assessments against abutting owners for their proportionate part of the amount for work that has been completed, and a perusal of the statutes show that ample legislative authority existed for such a procedure.

It is contended for the appellants that the public act affords no authority for the assessment because of the existence of the private act referred to, ch. 202, Private Laws of 1913, and we are cited to *Bramham v. Durham*, 171 N. C., 196, as authority for this position. That was a case involving the validity of a bond issue, and it appeared that the public act passed in 1915 authorized a bond issue without the approval of a popular vote. At the same session, 1915, the Legislature passed a special act by which the city of Durham was authorized, if the measure was approved by popular vote, to make a bond issue of $300,000 to construct, pave, and improve the streets and sidewalks of the city of Durham. The city authorities undertook to issue bonds for the purpose indicated without approval of the voters as the private act required, and the proposed measure was enjoined. It will be noted that both acts were in force and effect, and it was clear that the bond issue permitted to Durham only after a vote was intended to provide for the entire work then contemplated, that it contained a clause repealing any and all laws inconsistent with its provisions, and the Court held that the private act, being still in force and requiring a popular vote, was inconsistent with the proposed issue without such vote and by correct construction it had the effect of exempting the city of Durham from the public statute, assuredly so while the private act was in force and intended to cover, for the present at least, the entire subject. But not so here, where the bonds authorized by the private statute had been voted on, the measure approved, and the bonds issued and sold. There was nothing, therefore, in the private act that interfered or was intended to interfere with the power to proceed under the public statute, and to give full force and effect to the clause in C. S., 2704, that the public act shall be deemed additional and independent legislation for the purpose indicated, and shall provide an alternative measure for such purposes, "etc., etc." The case presented is substantially similar to that of *Fawcett v. Mt. Airy*, 134 N. C., 125. There the commissioners, who had made and expended a bond issue under a private law, were upheld in providing for additional funds under the general powers conferred upon them. See, also, the interpretation of this case appearing in *Ellison v. Williamston,* 152 N. C., 147, where the Court, in delivering the opinion, said: "In *Fawcett's case, supra,* the commissioners of Mount Airy had been empowered to submit to the voters a proposition to issue bonds to the amount of $50,000 for the purpose of 'procuring for the town a system of water-works and installing an electric plant to furnish the town with water and light.' The election was held, the measure approved, and the bonds issued and sold. It was subsequently disclosed that the bonds issued pursuant to this election were not sufficient for the purpose, and the commissioners, acting under the general authority vested in them by the law, issue bonds for the remainder of the cost.

"There, as stated, the measure had been approved, and bond issue for the amount had been issued and disposed of. The force and effect of the act was at an end, and the statute having fixed no limit on the amount, as in *Burgin v. Smith,* 151 N. C., 561, it was held that the question as to residue of the required expenditure was an open proposition to be dealt with by the municipality under its general power to provide for the necessary expenses of the town." It is fully understood, and has been repeatedly held, that the upkeep or repairs of streets, sidewalks, etc., is to be regarded as a necessary municipal expense, and requires no popular vote unless some law directly bearing on the subject may direct that such a vote be taken. See *Hargrave v. Comrs.,* 168 N. C., 626, and case cited, and the provisions of the private statute, ch. 202, Private Laws 1913, having been fully complied with, we see nothing in the facts as presented why the indebtedness incurred by the municipal authorities of Kinston does not constitute, in every way, a valid obligation of the city. The position is in no way affected by the Private Laws of 1915, purporting to ratify the acts of the municipal authorities in reference to the bond issue under the Private Laws of 1913, ch. 202. The statute of 1915 was evidently passed at the instance of the holders or proposed purchaser of the bonds, merely in order to cure apprehended defects of procedure, and thus make the bonds a more safe and desirable investment. No such defects, real or supposed, are set forth in the record, and in our minds this statute has no bearing on any question presented.

In the appeal of defendants the question is also raised and duly presented as to which of the defendants is primarily liable for these assessments in case liability is established. As heretofore stated, this depends on the proper construction of the lease of the Atlantic and North Carolina Railroad to the Howland Improvement Company, and under which the Norfolk Southern controls, and is now operating the lessor's road. We do not find the exact date of duration of this lease in the record, except that it is a lease of extended duration. Being a matter of very great interest, however, and affecting an important piece of State property, and having been fully presented to the Court in several suits where questions concerning it were involved, we feel justified in giving the date and duration, as stated, for 91 years and 4 months from 1 September, 1904. See copy in *R. R. v. R. R.*, 147 N. C., 372. The clause of this lease more directly pertinent is in terms as follows: "And the said lessee does further covenant to and with the said lessor that it shall pay, in addition to the rental reserved as aforesaid, and as a part of the rent to be paid for the property herein described, all taxes imposed upon the said leased property or upon the franchise of the said Atlantic and North Carolina Railroad, or its income whether by the State of North Carolina or any county, city, town, or township thereof, or by the United States, all such taxes shall be paid by the lessee so as to entirely relieve the lessor from payment of taxes of any nature whatever during the continuance of this lease, upon the property leased or upon the franchises of the lessor, or its income from the leased property," etc. It is not claimed or contended that the clause in question is not binding on the Norfolk Southern Railroad, and we are of opinion that by correct interpretation, it constitutes the Norfolk Southern Railroad the assignee of the Howland Improvement Company, the primary debtor in reference to plaintiff's claim.

While local assessments of this kind are not regarded as a tax in the sense of a general revenue measure, we have several times held that the right to enforce them is referred to the power of taxation possessed and exercised by government. They have been frequently denominated and held to be a special tax, in transactions of the kind presented here, and in this connection the length of the lease extending past the ordinary life of the improvement, in its benefit or burdens, has been allowed great weight. *Chicago R. R. v. Kansas City*, 75 Kan., 167; *Cemetery Co. v. Phila.*, 93 Pa., 129; *Erie v. Church*, 105 Pa., 278; *Gibbs v. Bank*, 198 Ill., 307; *Curtis v. Pierce*, 115 Mass., 186; *Harvard College v. Boston*, 104 Mass., 470-483. From the purpose and duration of the lease, from the broad and inclusive nature and meaning of the language used, a covenant protecting the lessor "from payment of taxes of any nature whatever," and from the better considered decisions on the subject, we are clearly of opinion that while the claim has been properly adjudged against both defendants, the primary liability between the two is on the lessee, the Norfolk Southern Railroad.

On defendants' appeal we find no error, and the judgment is

Affirmed.

PLAINTIFF'S APPEAL

Plaintiff excepted and appealed from the refusal of his Honor to give judgment of foreclosure and sale as against the defendant railroads to the extent that the same would interfere with the operation of the road and the discharge of their duties as common carriers.

It is very generally held that the Legislature may make these assessments a paramount lien on the franchise and property of a railroad, and in order to such an effect, it is not necessary for a statute to give such lien in express terms if by correct interpretation it intends that such a lien shall be conferred. And it has been held that in creating a lien for these assessments for local improvements against abutting property, the statute necessarily intends it shall be the superior claim, for otherwise such property could be effectually or very largely withdrawn from bearing its proportionate share of burdens required by the public weal. Speaking to the question of *Drainage Comrs. v. Farm Asso.,* 165 N. C., 697-702, a case substantially similar in principle, *Chief Justice Clark* said: "An analogous instance is the assessment of abutting proprietors for street improvements or upon landowners for building a county or township fence, all of which take priority over the holder of a mortgage, because the mortgagor can convey no exemption from public burdens which he does not himself possess." See, further, *Baldwin v. Meroney,* 173 Ind., 574, reported also in 30 L. R. A. (N. S.), at page 761, with a full and learned editorial note on the subject; *Dressman v. Farmers Bank,* 100 Ky., 571; *Seattle v. Hill,* 14 Wash., 487; 25 R. C. L. See page 188, title Special and Local Assessments, secs. 100 and 101. In the present case the private statute applicable to a portion of these claims, ch. 202, Private Laws 1913, and incorporating part of ch. 338, Private Laws 1905, gives the right to enforce the lien against the "property." And in the public statute, C. S., ch. 56, made as a complete act in itself and in addition to any local legislation appertaining to the subject, a lien is given in express terms against abutting railroad property and its franchise. In section 2713 of the act it is made "from the time of the assessment and confirmation thereof, a lien superior to any and all liens and encumbrances," and this by correct interpretation does not refer to subsequent liens, but the reference to the date of confirmation is only to fix the time when such lien is conclusively established, and when so established it takes precedence over all liens existent or otherwise. And further, in section 2717, the law provides, if the "lien is not paid when due, it shall be subject to the penalties now provided as in case of unpaid taxes." Thus showing a clear purpose of the Legislature to make the lien effective and superior to any and all other liens or encumbrances. It would be an idle thing to confer such a lien and then withdraw any and all means for its effective enforcement, and in our opinion the lien in question here, when properly established, amounts to a statutory mortgage, having preference, as stated, over any and all liens and encumbrances existent or otherwise, and to be enforced by decree of sale of the property and franchise, as in other cases provided, C. S., 3462-3463; *James v. R. R.*, 121 N. C., 523, and modified as to cases concerning property under Federal jurisdiction in *Julian v. Trust Co.*, 193 U. S., 93; *Pipe Co. v. Howland,* 111 N. C., 615; *Gooch v. McGee,* 83 N. C., 60.

There is error, and this will be certified that a proper judgment of foreclosure and sale be entered.

Error.

H. H. JOHNSON v. T. B. YATES ET AL.

(Filed 22 February, 1922.)

1. Liens—Artisans—Common Law—Statutes—Police Powers.

C. S., 2435, is within the police power of the State and in addition to the common-law lien given artisans on personal property repaired by them, while in their possession, for the reasonable value of the repairs, provides for its enforcement by foreclosure in accordance with its stated terms.

2. Same—Vendor and Purchaser—Contracts—Mortgages—Priorities.

C. S., 2435, giving to artisans a lien for the reasonable value of their work done on personal property while retained in their possession, with a prescribed method of foreclosure for the enforcement of the lien, enters into every contract of sale of personal property, whether by chattel mortgage to secure the balance of the purchase price or other, made between the vendor and purchaser, and when enforceable, is superior to the vendor's lien or that created by the mortgage.

3. Same—Legal Possession—Rights Implied.

The requirement of C. S., 2435, that the lien in favor of the artisan making repairs on personal property shall attach under the provisions of the statute, only where made at the instance of the owner "or the legal possessor of the property," includes within its terms all persons whose authorized possession is of such character as to make reasonable repairs necessary to the proper use of the property, and which were evidently in the contemplation of the parties.

4. Same—Automobiles.

Where the vendor of an automobile takes a purchase-money mortgage and transfers the possession to the vendee for an indefinite period, it is with the implied authority in the vendee that he may use the machine and keep it in such reasonable and just repair as the use will require; and where, at his instance, a mechanic has repaired the same, his reasonable charge for such repairs creates a lien on the automobile, retained in his possession, superior to that of the vendor's mortgage.

CLARK, C. J., dissenting.

APPEAL by defendants from *Bond, J.*, at the Fall Term, 1921, of WAKE.

Civil action, heard on case agreed.

The following are the facts submitted:

"1. Plaintiff is, and was at the time this controversy arose, a citizen and resident of Franklin County, N. C., and defendants were at said time and are citizens and residents of Wake County, N. C., and engaged as a partnership in business as mechanics and artisans in expert automobile repairing under the name of Auto Repair and Welding Company, with their place of business in Raleigh, N. C.

"2. On or about 22 May, 1920, plaintiff sold one J. W. Stewart a Liberty Six automobile, motor No. 7K27580, model 1919, taking from said Stewart a chattel mortgage and note in the sum of $500 as balance purchase money for said automobile.

"3. The chattel mortgage, a copy of which is attached hereto and made part of this agreement, was duly recorded on 22 May, 1920, in Book 323, page 323, in the registry of Franklin County.

"4. Various payments have been made on said note by J. W. Stewart, and the balance now due and unpaid is $117.

"5. On 3 December, 1920, subsequent to the recording of said chattel mortgage and note, J. W. Stewart, without the actual knowledge and without the actual consent of plaintiff, and without notifying plaintiff, drove the said automobile to the shop of defendants in Raleigh, Wake County, N. C., and at the request of said Stewart certain repairs were made on said automobile by defendants, which increased the value thereof, and a just and reasonable charge for the work done and material furnished in making said repairs is $460.55, and bill for said amount was rendered to J. W. Stewart and not paid by him within more than ninety days after the repairs were made, and said bill has never been paid.

"6. That at the time said repairs were made, defendants had no actual knowledge of the existence of the mortgage from J. W. Stewart to plaintiff, and had no actual knowledge of any indebtedness of said Stewart to plaintiff.

"7. That at the time of making said mortgage and at the time of the driving of said automobile to the shop of defendants in Raleigh, J. W. Stewart was a resident of Franklin County, N. C.

"8. The repairs to said automobile were made by the defendants without actual knowledge or actual consent of plaintiff.

"9. At the time said repairs were made, J. W. Stewart was in possession of said automobile as mortgagor under the mortgage held by plaintiff as mortgagee, and said Stewart had been in possession of said automobile at all times since the execution of said mortgage, and was using and driving same with the knowledge and without objection on the part of the mortgagee.

"10. That after the repairs were made, and as soon as plaintiff ascertained that said automobile was in possession of the defendants, he made demand for the possession of same for the purpose of foreclosing his mortgage and thereby collecting the balance due on the note of J. W. Stewart, but defendants refused, and still refuse, to deliver the automobile to plaintiff, claiming the right to hold said automobile and sell it under the provisions of C. S., 2435, and apply the proceeds to the payment of their bill for repairs ahead of plaintiff's claim for balance due on the note of J. W. Stewart secured by mortgage.

"11. Plaintiff claims the right to the possession of said automobile under his mortgage and the right to sell same under the mortgage and apply the proceeds to the satisfaction of balance due on note of J. W. Stewart ahead of payment of the bill of defendants for repairs.

"12. That said automobile is now in possession of defendants, and has at all times been in their possession since it was first left at their shop by J. W. Stewart to be repaired.

"13. That the purpose of the submission of this controversy is to determine whether the plaintiff, by virtue of his mortgage, is entitled to the possession of said automobile and has right to sell same under said mortgage and apply the proceeds of sale first to the satisfaction of balance due on note of J. W. Stewart, or whether the defendants have the right to retain possession of said automobile and sell same under the provisions of C. S., 2435, and apply the proceeds first to the payment of the charge of defendants for repairs."

Submitted by consent of plaintiff and defendants.

Upon the facts judgment was entered for plaintiff, and defendants excepted and appealed.

William H. and Thomas W. Ruffin for plaintiff.
Murray Allen for defendants.

HOKE, J. C. S., 2435, provides as follows: "Any mechanic or artisan who makes, alters, or repairs any article of personal property at the request of the owner or legal possessor of such property has a lien on such property so made, altered, or repaired for his just and reasonable charge for his work done and material furnished, and may hold and retain possession of the same until such just and reasonable charges are paid; and if not paid for within thirty days, if it does not exceed $50, or within ninety days if over $50, after the work was done, such mechanic or artisan may proceed to sell the property so made, altered, or repaired at public auction, by giving two weeks public notice of such sale by advertising in some newspaper in the county in which the work may have been done, or if there is no such newspaper, then by posting up notice of such sale in three of the most public places in the county, town, or city in which the work was done, and the proceeds of the said sale shall be applied first to the discharge of the said lien and the expenses and cost of keeping and selling such property, and the remainder, if any, shall be paid over to the owner thereof." This statute, passed in the valid exercise of the police powers of government, is applicable to any and all contracts by mortgage or otherwise subsequently made and entered into, and affects their interpretation to the extent that its provisions are pertinent. *House v. Parker,* 181 N. C., 40; *White v. Kincaid,* 149 N. C., 415; *Brine v. Ins. Co.,* 96 U. S., 627; Bishop on Contracts, sec. 437. In its effect and purpose the law is in affirmance of the common-law lien given to artisans who have altered or repaired articles of personal property and are in possession of same, with the superadded right of foreclosure by sale in order to make the lien effective, and from a perusal of the terms, it clearly appears that where such a claim is allowed to prevail it is, and is intended to be, a primary lien, superior to that by an existent mortgage or others. The statute providing that the mechanic or artisan may hold and retain possession till his reasonable cost and charges are paid, and the power of foreclosure conferred being by sale of "the property" itself and not of any special interest therein. A further consideration of the statute will disclose that the lien provided for can only arise when the alterations or repairs are made at the instance of the "owner or legal possessor of the property." And from the meaning and purpose of the statute, and under the authoritative and better considered decisions dealing with the subject, both in the application of the common-law principles involved and in the construction of statutes of similar import, these terms must be understood and interpreted to include all owners of the property and all persons in possession and use of same with the knowledge and assent of the owner and under circumstances giving express or implied authority from him to have such reasonable and necessary repairs made as may be required in the use of the property contemplated by the parties. *Smith Auto Co. v. Kaestner,* 164 Wis., 205;

Mortgage Securities Co. v. Pfaffman, 177 Cal., 109; *Reeves & Co. v. Russell,* 28 N. D., 265; *Watts, Trustee, v. Sweeney,* 127 Ind., 116; *Broom & Son v. Dale & Sons,* 109 Miss., 52; *Case v. Allen,* 21 Kan., 217; *Drummond Carriage Co. v. Mills,* 54 Neb., 417; *Hammond v. Danielson,* 126 Mass., 294; *Ruppert v. Zang,* 73 N. J. L., 216; *City Nat. Bank v. Laughlin* (Texas Court of Appeals), 210 S. W., 617; *Williams et al. v. Allsup* (10 C. B.), 142 Eng. Reprints, p. 514; 1 Jones on Liens, sec. 744; 6 C. J., p. 1138. In illustration and support of the position as it prevailed at common law in case where a dray wagon, under a duly registered valid mortgage, was left with the mortgagor for use in the latter's business, and the same was repaired at the instance of the mortgagor, on a question of priority of the mechanic's lien, it was held that where a mortgagee permits the mortgagor of chattels to retain and use them, authority is impliedly conferred upon the mortgagor to have necessary repairs done on the chattels and the lien of an artificer for repairs done under employment of the mortgagor will have priority over the lien of a mortgage, although the latter be duly recorded. And in the case from the English court of *Williams et al. v. Allsup,* a mortgagor in possession and use of a ship, with assent of the mortgagee, had certain necessary repairs done thereon, it was claimed that a certain statute had modified the common-law principle giving the mechanic's lien the preference. In rejecting the position contended for *Byles, J.,* speaking to the instant question said: "The mortgagees have permitted the mortgagor to be in the uncontrolled possession of the vessel; and it should seem to have been a mortgage for an uncertain and undefined period. Now, as it is obvious that every ship will from time to time require repairs, it seems but reasonable, under circumstances like these, to infer that the mortgagor had authority from the mortgagées to cause such repairs as should become necessary to be done upon the usual and ordinary terms. Now, what are the usual and ordinary terms? Why, that the person by whom the repairs are ordered should alone be liable personally, but that the shipwright should have a lien upon the ship for the work and labor he has expended on her." And on statutes enacted in affirmance and extension of the common-law principle and expressed in terms exactly or substantially similar to the one before us, in *Broom v. Dale,* 109 Miss., *supra,* the Court held: "Under Code 1906, sec. 3075, which is merely declaratory on the common law, and which provides not only that a mechanic may retain, in his possession, any article which he repairs until the price of his labor and material furnished shall be paid, but also provides for the enforcement of the lien, where a mechanic repaired an automobile, the repairs being ordered by the person in possession, who was apparently authorized to contract for same. Such mechanic has a lien for his labor, which takes precedence over the rights of the vendor of the machine who sold it, reserving title to secure payment, but transferred the possession to the party ordering the repairs." And in *Securities Co. v. Pfaffmann,* 177 Cal., *supra,* the Court held: "Under sections 3050-52 of the Civil Code, the possessory lien of the improver or repairer of personal property is superior to the preëxisting lien of a chattel mortgage." And in *Smith v. Kaestner,* 164 Wis.: "The mechanic's lien, given sec. 3343, Stats., for repairs upon personal property is superior to the lien of a duly filed prior mortgage upon the property." This was an action of replevin by the vendor holding a mortgage for the purchase price, which had been left in possession of purchaser for use, and which had been repaired at her instance, *Vinje, J.,* delivering the opinion, after stating that there was conflict of opinion in claims dependent upon the common-law principles alone, said: "In view of the provisions of our statutes we need not consider the question of the priority of the common-law lien over an antecedent mortgage. Section 3343 expressly gives the mechanic a prior lien when he has made the repairs at the request of the owner or legal possessor of the property, for it says that in such case he may retain possession of the property until his charges are paid. In the case the defendant (the purchaser) was the legal possessor and the repairs were made at her request. The clause 'and may retain possession of such property until such charges are paid' contains no exception in favor of prior-lien claimants, and the court can make none. When the repairs are made at the request of the owner or legal possessor of the repaired property, the statute insures possession thereof in the mechanic till his just and reasonable charges are paid." And speaking generally to the question of priority in Jones on Liens, sec. 744, the author says: "It is certain that the mortgagor cannot by contract create any lien which shall have priority over the mortgage. But the mortgagee's authority for creating the lien may be implied, and the implication arises from the mortgagor being allowed to remain in possession of the property and to use it for profit." There are cases apparently to the contrary in some of the other states, but we do not consider it necessary or desirable to make extended reference to these decisions. Some of them proceed on the principle that the lien claimed, not being made dependent on retention of possession, was entirely statutory, and as the statute in terms established no priority, the mortgage of prior registry would hold its preference. This seems to be the position approved in *Shaw v. Webb,* 131 Tenn., 173. In others interpreting the common-law principle it has been held that the right to incur the charges claimed to the owner's prejudice was not implied from the possession and use allowed by the owner to the person who made the contract for the services rendered. Thus, in *Storms v. Smith,* 137 Mass., 201, it was decided that a claim for storage of furniture incurred by the mortgagor in possession should not prevail as against the mortgage of prior registry, the right to incur such a charge not being implied from the possession allowed to the mortgagor. But the same Court, in *Hammond v. Danielson,* 126 Mass., *supra,* held that in case of repairs to a hack the artisan's lien had priority, it appearing that the use of the hack was contemplated. But in none of these cases, so far as examined, was the priority of the artisan's lien denied, where, as in this instance, the statute in affirmance of the common law gives to the artisan the right to retain the property till the reasonable repairs are paid for, with the further right to sell the property for same, and, where the repairs in question are made at the instance of the owner himself, or legal possessor, that is, one to whom the owner has given possession, and under circumstances clearly contemplating that the property should be kept in use by the possessor and the necessary and reasonable repairs made. It is clear that on the facts presented and on others in like case, the vendor of an automobile taking a purchase-money mortgage, and who transfers the possession to the vendee for an indefinite period, does so in contemplation that the machine is to be used and kept in use, and with the implied authority to have such reasonable and just repairs made as will be required by the purpose contemplated. It is urged upon our attention that on authority with us, where a vendor takes a purchase-money mortgage which is duly registered, the title is considered as never having passed to the vendee, but that the vendor remains continuously the owner, and for the purpose of shutting off existent liens this is undoubtedly true. Furthermore, it is the recognized principle in this jurisdiction that a mortgagee, after default, is regarded as the owner, with the right of taking possession of the property at will. *Hinson v. Smith,* 118 N. C., 503. But the principle we uphold and apply in this case is not in contravention of these rulings. Here the statute, as stated, gives the prior lien for repairs, whenever they are made at the instance of the "owner or legal possessor," and our decision rests upon the position that the mortgagor is such legal possessor, having implied authority from the owner, the mortgagee, to contract for repairs and subject the machine to the lien as provided. Again, we are referred to various decisions in this State to the effect that in order to a valid mechanic's lien there must be a personal debt upon which it may be based. The cases where this principle has been upheld were those involving claims for a mechanic's lien of real estate, coming under other provisions of other laws, C. S., 2433, *et al.,* as in *Kearney v. Vann,* 154 N. C., 311; *Weathers v. Borders,* 124 N. C., 613, or if against personalty the property was in the position of fixtures and the artisan was never in possession of same. Thus, in *Baker v. Robbins,* 119 N. C., 289, the claimant had made repairs on a stationary boiler used in operating a sawmill, and was never in possession of the boiler within the purview and meaning of the statute we are now considering. While some of the expressions in this opinion may militate against the validity of the defendants' lien, a perusal of the opinion will show that it proceeded upon the theory that the claimant was not in possession of the property, and had never been.

On the facts set forth in the case agreed, we are of opinion, and so hold, that defendant's claim for reasonable repairs made at the instance of the legal possessor and under the implied authority of the mortgagee, has the prior lien, and this will be certified that judgment may be entered and enforced pursuant to law.

Reversed.

CLARK, C. J., dissenting: The sole question presented by this appeal is whether the plaintiff, who retained title to an automobile by virtue of a chattel mortgage, executed at the time of the sale, for the balance due on the purchase money, which was duly recorded in the resident county of the mortgagor and mortgagee, is entitled to priority in the payment of balance due on his debt secured by said mortgage, over the lien of a mechanic for repairs on said automobile made in a county other than that of the mortgagor's residence without the knowledge or consent of the mortgagee. The trial court rendered judgment in favor of the mortgagee, and the defendant, claiming the mechanic's lien, appealed.

Baker v. Robbins, 119 N. C., 289, is practically on "all fours" with the present case. In that instance the mortgagor of a sawmill boiler, without the consent or knowledge of the mortgagee, employed the plaintiff mechanic to repair the boiler. The latter filed his lien for repairs, claiming priority over the recorded mortgage. The Court held: "This case falls under the doctrine laid down by the Court in *Hanch v. Ripley,* 127 Ind., 151, where it was held that the lien of a mortgage is superior to a subsequent lien created by statute."

In *Smoak v. Sockwell,* 152 N. C., 503, this Court held that where a chattel mortgage for the purchase money of a mule was properly registered in the county of the mortgagor's residence as required by Rev. 1905, sec. 982 (now C. S., 3311), the mortgagee could recover the mule wherever found. The plaintiff in this case, simultaneously with the conveyance of the automobile, having taken a mortgage, the title was never for an instant out of the plaintiff. *Bunting v. Jones,* 78 N. C., 242, and the numerous citations to that case in 3 Anno. Ed. There is no release or waiver even alleged against the vendor, who has remained at all times the owner of the legal title to the property sold.

There is no implied waiver, from the mere fact that the purchaser is allowed to use and operate the machine, of the owner's right to take possession of the property on nonpayment of the balance due. The vendee was not the agent of the vendor. He was tenant at will and had no more right to give a lien for repairs thereon than to sell it or to mortgage it. He could not "improve the owner out of his property."

It is true the defendant has placed his work upon the machine, but he has acquired thereby a lien only on the mortgagor's interest thereon. It was exactly the case as if a party in possession of a stolen or borrowed mule had placed him in a livery stable to board without the knowledge or consent of the owner. In such case he would lose his lien for the feed. The defendant was negligent in that he did not make proper inquiry as to the ownership or did not take the precaution to wire to the county-seat of the owner's residence. If he did not take this trouble it was his own fault.

On the other hand, the owner of the machine had his money invested therein, and he was guilty of no negligence whatever. He took his mortgage for the purchase money, and had it recorded in the manner required by law. He had no means by which he could prevent the mortgagor from driving the machine into another county, and could give no notice beyond the registration of the mortgage, whereas the mechanic could and should have ascertained the ownership before placing the repairs on the machine.

The owner has done all that the law required, and has a right to recover the money due him on the property, to which he still holds the legal title until the purchase money is paid in full. The mechanic has put his labor on the machine, but he took no care to ascertain beforehand the ownership of the property. As between the two claims, the owner has complied with the law in every respect and been negligent in nothing, and should not lose his lien in favor of the subsequently accruing claim for repairs to a party who was negligent.

This doctrine has always been observed as to mules and other animals who can be carried from county to county, and it is doubly essential that it should be enforced in the case of automobiles, which can be moved rapidly not only to other counties but to other states, and as to which the registration plate gives a better opportunity to inquire as to the ownership of the property than could be ever afforded to the owner of a mule or horse, as to which, as in *Smoak v. Sockwell, supra*, it was held in an opinion by *Hoke, J.*, that "the mortgage having been duly registered according to the statute, was a valid lien on a mule wherever the same could be found."

The importance of the priority claimed by the defendant in this case is clear from the fact that the amount of repairs claimed as a lien by the mechanic is $460.55 on an automobile that cost $500 originally, and the assertion of the priority of the lien for repairs will wipe out the balance due on the mortgage of $117.

Registration of the mortgage upon a proper probate is notice to all the world of the existence thereof and the nature and extent of the charge created by it. *Harper v. Edwards,* 115 N. C., 246.

The laws of this State recognize the priority of a recorded mortgage, and the plaintiff should be allowed to take possession of the automobile and sell it to satisfy the balance due on his mortgage. If this is not done, it will upset the entire law of registration, so clearly understood and strictly adhered to in this State. To exempt an automobile from this rule would be in violation of the well settled doctrine by which owners or mortgagees can protect themselves against subsequently accruing claims. The defendant has been careless; the plaintiff has strictly followed the law, and has done nothing to waive his rights in the property, and should be entitled to recover the balance due.

S. S. McNINCH ET AL. v. AMERICAN TRUST COMPANY ET AL.

(Filed 22 February, 1922.)

1. **Trusts—Fraud—Parol Trusts—Equity.**

Where the mortgagee of lands has induced the mortgagor not to file his petition in voluntary bankruptcy by agreeing by parol that the mortgage be foreclosed by suit, bought in by the mortgagee, and held in trust to make it obtain the best available price, and in breach of this contract the mortgagee has become the purchaser at the judicial sale, and has failed to perform his agreement, and has negligently resold the land below the prices it should have brought, and the gravamen of the present action is the fraud thus perpetrated, the parol contract is but an incident to the fraud, against which equity will relieve; and the statutes in other jurisdictions which will not permit a trust in lands to be established by parol, has no application.

2. **Same—Constructive Fraud—Mortgages—Judicial Sales—Foreclosure.**

Where the mortgagee has become the purchaser of the mortgaged land in proceedings to foreclose by suit, and has perpetrated a fraud upon the mortgagor in violation of a parol agreement he had theretofore made with him, to hold the land in trust for certain purposes, the mortgagee's breach of the parol contract constitutes a species of constructive, if not actual fraud against which equity will relieve, and establish a trust in favor of the mortgagor to prevent the perpetration of the fraud.

3. Trusts—Equity—Actual Fraud—Bad Faith—Constructive Fraud.

Equity, in proper instances, will not withhold relief if actual fraud be not shown, when such conduct and bad faith is shown on the party against whom it is sought as would shock the conscience of the chancellor.

4. Same—Judgments—Estoppel.

A judgment in a suit of foreclosure of a mortgage on land does not estop the mortgagor from showing such fraud therein on the purchaser's part as will create a constructive trust in his behalf.

5. Trusts—Mortgages—Equity—Damages.

The rules of equity are those of conscience and prevail where the relief at common law is inadequate and deficient; and where the purchaser of land foreclosed by suit has fraudulently disposed of the lands which he should have held in trust, he will be held to respond in damages.

6. Pleadings—Interpretation—Lex Fori—Trusts—Fraud—Express Trusts.

Where suit is brought here to affect the foreclosure at a judicial sale of land in another state with a trust *ex maleficio*, the pleadings will be construed under our own decisions, the *lex fori*, as to whether the allegations are sufficient to allege a constructive trust, liberally construed, or only an express trust: *Held*, in this case, a constructive trust was sufficiently alleged to be shown.

7. Appeal and Error—Presumptions—Burden of Proof—Prejudice.

Error alleged on the trial in the Superior Court must affirmatively be shown by the appellant in the Supreme Court, with certainty that he has thereby been prejudiced or disadvantageously circumstanced before the jury, which does not sufficiently appear in this case to award a new trial.

APPEAL by defendants from *Harding, J.*, at March Term, 1921, of MECKLENBURG.

Civil action to recover damages for an alleged breach of trust.

In 1917 the plaintiffs were financially embarrassed. They owned a valuable brick plant and about 682 acres of river-bottom land, situate on the banks of the Catawba in York County, South Carolina. This property was mortgaged to the American Trust Company to secure the payment of certain outstanding obligations, aggregating approximately $34,000. The mortgagee trust company filed suit in the court of common pleas of York County, South Carolina, to collect this indebtedness and to foreclose the mortgages held against said properties.

Regarding the transactions and dealings between the parties subsequent to this date, there was allegation and also proof tending to show that at the time said suit was instituted, and while the same was pending against the plaintiffs, there was no market for the realty covered by said mortgages and no market for the brick plant and machinery covered by same, and the plaintiffs were unable to sell said property, or to raise money with which to pay off the indebtedness held by the defendant trust company; that the United States of America had recently declared that a state of war existed between this country and the German Empire, and the business conditions generally were greatly disturbed and the business of the plaintiffs was practically at a standstill. The plaintiffs, realizing their inability to meet their debts, were preparing to file a petition in bankruptcy when the American Trust Company, through its officers and agents, approached the plaintiffs and represented to them that the said trust company desired to help the plaintiffs in their financial distress; and that if the plaintiffs would not file a petition in bankruptcy, but would consent for a decree of foreclosure to be entered by the state courts of South Carolina, the said defendant would give the plaintiffs until some time in February, 1918, to effect a sale of their property; and that if the plaintiffs should be unable to effect a sale of their property by that time, or raise the money with which to pay off the mortgaged indebtedness, the said trust company would protect the interests of the plaintiffs by buying in the property for them and selling it to the best advantage—it being understood and agreed between the plaintiffs and the American Trust Company that this should be done, if it became necessary to sell, and in this event the defendant was to hold said property in trust for the plaintiffs and sell the same at private sale, with the assistance of and subject to the approval of plaintiffs. It was further understood that the defendant trust company would use due diligence to sell the property at a fair and reasonable price, acting for and on behalf of the plaintiffs in thus handling the property.

The plaintiffs, relying upon the above representations, permitted the defendant trust company to buy in the South Carolina property, with the exception of a small tract, for the sum of $15,700, which it is alleged was a grossly inadequate price.

There was further allegation and proof tending to show that the American Trust Company did not faithfully discharge the agreement which it had made with plaintiffs, and did not sell the property for the best price obtainable, and did not use due diligence in making sale of same; but carelessly, negligently, and wrongfully, in breach of its agreement with plaintiffs, and in breach of the duties imposed upon it by law, and in breach of the trust imposed upon it by equity, slaughtered and sacrificed said property and sold same at a price which was grossly inadequate, without the consent of the plaintiffs and without consulting the plaintiffs, in violation of the agreement and promise which it had made.

The defendants denied the existence of any trust agreement with plaintiffs, and denied that they had purchased under or in consequence of such agreement; and, on the other hand, alleged that they made diligent efforts to obtain, and did obtain, the best price possible for the property, and pleaded the judgment of the court of common pleas of South Carolina as an estoppel and in bar of plaintiffs' right to recover.

Upon the traverse and issues thus joined, the jury returned the following verdict:

"1. Are the plaintiffs estopped from prosecuting their first cause of action by the final judgment or decree rendered by the court of common pleas of York County, South Carolina, in the consolidated actions in which the American Trust Company was plaintiff and the Charlotte Brick Company and S. S. McNinch *et al.* were defendants, as alleged in the answer? Answer: 'No.'

"2. Did the defendant American Trust Company agree with the plaintiffs to purchase their South Carolina property, if a public sale thereof should be had, and hold the same for the use and benefit of the plaintiffs, and dispose of it subject to their approval, as alleged in the complaint? Answer: 'Yes.'

"3. Did the plaintiffs rely upon said promise and allow said property to be bid in by the defendant, as alleged? Answer: 'Yes.'

"4. If so, did the defendant American Trust Company bid in the said property at a grossly inadequate price, as alleged? Answer: 'Yes.'

"5. If so, did the defendant American Trust Company wrongfully and negligently dispose of said property for less than its value, as alleged? Answer: 'Yes.'

"6. What damages, if any, are the plaintiffs entitled to recover of the defendant American Trust Company? Answer: '$20,344.' "

Judgment on the verdict in favor of the plaintiffs; defendants appealed.

Stewart & McRae and Stack, Parker & Craig for plaintiffs.

Cansler & Cansler, John M. Robinson, and James A. Lockhart for defendants.

STACY, J., after stating the facts as above: The foregoing statement of the case will suffice for a sufficient understanding of our present decision. There are other circumstances, relating chiefly to the second cause of action, which are deemed unnecessary to be set out in detail, as they are only subsidiary to the objective and controlling facts above stated.

His Honor directed a negative answer to the first issue; and this presents for our consideration the validity of the defendants' plea of estoppel, based upon the judgment of foreclosure entered by the court of common pleas of York County, South Carolina. The defendants contend an absolute title was decreed by said judgment, and that, under section 7 of the statute of frauds, which is recognized as a part of the South Carolina law, the plaintiffs are not entitled to set up a parol trust in lands; and, therefore, should not be permitted to maintain this suit. Plaintiffs, in reply to this contention, say (1) that the defendants have failed to plead the South Carolina law; (2) that the statute of frauds, including section 7, is no bar to their right to prosecute this action; and (3) that the foreign law is not applicable, but, even if it is, they are still entitled to recover under the verdict rendered herein.

In undertaking to ascertain the relative merits of these opposite and conflicting claims, a clear understanding of the exact basis of the alleged cause of action becomes essential and indispensable. Plaintiffs are not seeking to recover on the agreement nor to have it specifically enforced; but the gravamen of the complaint is the alleged *mala fide* of the defendant in procuring the title in confidence and failing to discharge the trust in keeping with the principles of equity and good conscience. The statute of frauds was not intended to shelter or to shield frauds, but to prevent them. 39 Cyc., 171. Thus, the ground of equitable relief and immunity from the statute is the fraud, alleged to have been perpetrated, and not the agreement to hold in trust. *Floyd v. Duffy*, 68 W. Va., 339; 33 L. R. A. (N. S.), 883. It is not the parol contract, but the *trust* that is sought to be enforced. If the plaintiffs were lulled into security and thereby induced to desist from trying to save their property, and the defendants were permitted to purchase it at a grossly inadequate price, then the right of action rests, not upon the parol contract, but upon the fiduciary relations and transactions of which the agreement was a mere attendant. Hence, for the defendant trust company, in breach of the confidence which it had thus acquired, to repudiate the trust and dispose of said property for less than its value, wrongfully and negligently, would render its claim of absolute ownership contrary to conscience and at variance with the first principles of right. *Rice v. Rice*, 107 Mich., 241; *Thompson v. Thompson*, 30 Neb., 489; 26 R. C. L., 1238. This would be an unjust enrichment, amounting to a legal fraud, which the law cannot condone. *Cook v. Cook*, 69 Pa., 443.

On the other hand, with an eye single to the principles of fair dealing and in order to frustrate the wrong thus sought to be done, equity will establish a trust in favor of the plaintiffs so as to prevent what otherwise would amount to a fraud. *Stahl v. Stahl*, 214 Ill., 131. It is not the fact that the bargain, by which the title was obtained, rests in parol that governs the case, but the fact that the title was procured in confidence, the breach of which constitutes a species of constructive if not actual fraud and bad faith. *Arnston v. Sheldon First Nat. Bank*, L. R. A., 1918, F, 1038, and note. It would be strange, indeed, if such conduct were beyond the reach of a court of equity. *Sumner v. Staton*, 151 N. C., 198; *Avery v. Stewart*, 136 N. C., 437. It is not necessary that actual fraud be shown, but the establishment of such conduct and bad faith on the part of the defendants as would shock the conscience of a chancellor will suffice to invoke the aid of a court of equity. *Forbes v. Harrison*, 181 N. C., 464. The oral agreement, instead of being a bar to plaintiffs' right to recover, is a pertinent circumstance tending to support the allegations of fraud.

"Where a purchaser at a judicial sale becomes such under such circumstances or state of facts as would make it a fraud to permit him to hold on to his bargain (*Collins v. Sullivan*, 135 Mass., 461; *Hansen v. Hansen*, 188 Pac., 460), as by representing that he is buying for the benefit of those who own or have an interest in the property being sold (*Marlatt v. Warwick*, 18 N. J. Eq., 108), or that he intends to reconvey such property (*McNew v. Booth*, 42 Mo., 189; *Henry v. Brown*, 8 N. J. Eq., 245), and thereby obtains it at a sacrifice, the courts will relieve against such fraud; and the person who has gained an advantage by means of such fraudulent acts will be converted into a trustee for those who have been injured thereby." 39 Cyc., 176.

The trusts thus established or created are usually denoted constructive trusts because they are born of necessity, by operation of law; and, where the facts presented are sufficient to raise such a trust, they take the case out of the operation of the statute of frauds. It is an established rule of equity that the statute will not be allowed to operate as a protection for a fraud, or as a means of seducing the unwary into a false confidence, whereby their intentions are thwarted, or their interests are betrayed; but against such practices the law, as formerly administered in chancery, sets itself like flint or adamant. *Brogden v. Gibson*, 165 N. C., 16; *Avery v. Stewart*, 136 N. C., 426; *Gorrell v. Alspaugh*, 120 N. C., 362; *Brinson v. Brinson*, 75 Cal., 525; 39 Cyc., 170; 26 R. C. L., 1233.

In the English case of *Haigh v. Kaye*, reported in 7 Chancery Appeal Cases, 469, *Lord Justice James*, speaking to this question, said: "The defendant admits that he took the estate upon the most positive (oral) agreement to return it; but in another part of his answer he sets up the statute of frauds, and claims the estate as a right. Now the statute of frauds no doubt says that a person claiming under any declaration of trust or confidence must show that in writing; but the statute goes on to say that no resulting trust, and no trust arising from operation of law, is within that enactment. I apprehend it is clear that the statute of frauds was never intended to prevent the court of equity from giving relief in the case of a plain, clear, and deliberate fraud."

This is not only the law as it obtains with us, and as held in other jurisdictions (*Griffin v. Taylor*, 139 Ind., 573; *Hoover v. Strohm,* 44 Pa. Sup., 177), but it is also the law of South Carolina, as declared by the Supreme Court of that state.

In *Jarrott v. Kuker* (S. C.), 59 S. E., 533, the doctrine is announced as follows: "One orally agreed to attend a judicial sale of real estate held by a trustee, and purchase the same for the trustee and hold it as security for payment of the price to him by the trustee. He purchased the premises, and the trustee, relying on the agreement, did not attend the sale: *Held*, that a trust would be declared in favor of plaintiff on the land notwithstanding the statute of frauds; the relief not being based on the agreement, but on the chilling of the bidding at the sale."

And again, in *Bank v. Alderman* (S. C.), 91 S. E., 296, *Gary, C. J.,* quotes with approval from 39 Cyc., 169, the following concise and pertinent statement: "Constructive trusts do not arise by agreement or from intention, but by operation of law; and fraud, actual or constructive, is their essential element. Actual fraud is not necessary, but such trust will arise whenever the circumstances under which the property was acquired make it inequitable that it should be retained by him who holds the legal title. Constructive trusts have been said to arise through the application of the doctrine of equitable estoppel, or under the broad doctrine that equity regards and treats as done what in good conscience ought to be done. Such trusts are also known as trusts *ex maleficio,* or *ex delicto,* or involuntary trusts, and their forms and varieties are practically without limit, being raised by courts of equity, whenever it becomes necessary to prevent a failure of justice."

Possibly it would be well to note, also, that, just as in the English statute, sec. 3677 of the Civil Code of South Carolina, provides that "trusts arising, transferred or extinguished by implication of law," are excepted from the operation of the statute of frauds. See, also, *Fairey v. Kennedy* (S. C.), 47 S. E., 138; and *Knobelock v. Bank,* 43 S. C., 233.

This position as it prevails with us is so fully and accurately stated in the leading cases of *Avery v. Stewart, supra; Sykes v. Boone,* 132 N. C., 199, and *Davis v. Kerr,* 141 N. C., 11, that we content ourselves by referring to these cases as controlling authorities on the subject now in hand.

Thus, under the law as it obtains here and elsewhere, and as declared in the State of South Carolina, it would seem that the plaintiffs are entitled to maintain their suit; and that the statute of frauds is in no way a bar to its prosecution. The equity sought to be enforced does not rest upon the idea of the specific performance of a parol contract, but rather upon the idea of enforcing the execution of a trust—the relation of the parties being that of trustee and *cestuis que trustent.* *Allen v. Gooding,* 173 N. C., 93; *Russell v. Wade,* 146 N. C., 116; *Cloninger v. Summit,* 55 N. C., 513.

But it was earnestly contended on the argument that, as the property in question has been sold, there is nothing to which the trust may attach, and, therefore, it must fail because it cannot be enforced. In reply to this position, it is sufficient to say that the law, in principle if not upon the same state of facts, has been declared otherwise in *Mfg. Co. v. Summers,* 143 N. C., 102, and *Sprinkle v. Wellborn,* 140 N. C., 163. Equity is not so easily daunted, for it is that system of jurisprudence in which the conscience rules; it is not bound by form, but seizes the substance and affords relief where the law, on account of its universality, is inadequate or deficient. Its arms are neither short nor palsied; and hence, it will so mould its decrees as to fit the exigencies of each particular case. It regards and looks upon that as done which of right ought to be done (equity's favorite maxim); and here, the defendant having wrongfully and negligently sold the property which it held in trust at a grossly inadequate price, it is but meet that the offending party should respond in damages to the extent of the value of said property. *Newton v. Porter,* 69 N. Y., 133.

It should be observed that we are not now dealing with the principles of an express trust, or one based solely upon contract, stripped of any element of actual or constructive fraud. It will be readily conceded that the mere nonperformance of a parol agreement, unaccompanied by any circumstances of oppression or inequitable conduct, would not of itself entitle the plaintiffs to relief. 39 Cyc., 178. Herein lies the distinction between the contentions and arguments of the opposing sides to this controversy. Plaintiffs maintain that a constructive trust has been shown and established, while the defendants earnestly contend that, at most, only an express parol trust has been alleged or proven. The authorities cited and relied upon by both sides are clearly distinguishable by reason of the underlying differences of the two positions. From the hypothesis or premise of each the opposite and divergent conclusions readily follow. But in the light of the verdict, as rendered by the jury, it would seem that the plaintiffs have sustained their allegation of a constructive trust. Thus, it becomes necessary to treat in detail the cases cited by the defendants, as they bear largely upon the doctrine of an express trust.

The learned witnesses for the defense, *Judge Jones* (former *Chief Justice* of the State Supreme Court), and Mr. Marion of South Carolina, based their testimony, in the main, as to the law of their state, upon the assumption that an express trust had been alleged and set up in the complaint. But in the construction of the pleadings, our own law, the *lex fori,* is to govern (31 Cyc., 45); and with us a liberal construction must be given in favor of the pleader, "with a view to substantial justice between the parties." C. S., 535; *Hartsfield v. Bryan,* 177 N. C., 166. We think the facts alleged are sufficient to establish a constructive trust. *McFarland v. Harrington,* 178 N. C., 191; *Rush v. McPherson,* 176 N. C., 562; 26 R. C. L., 1232. It was conceded by the defendants' witnesses that, with respect to the doctrine of constructive trusts, the law of South Carolina is not materially different from that announced by this Court in *Avery v. Stewart, supra,* and other cases to like import.

Holding, as we do, that the instruction on the first issue was correct, whether tested by the law of this State or by the law of South Carolina, it follows that the remaining exceptions, which group themselves principally about this pivotal question, must be overruled. To consider them *seriatim* would only entail a repetition in part of what has already been said.

There is one exception of a different nature, however, which calls for further discussion. We quote from the record: "During the taking of the testimony, pending argument as to the competency of certain questions and answers and explanations offered by the witness P. C. Whitlock, the court, in the presence and hearing of the jury, asked the question whether the witness was appearing as attorney or as a witness, stating that the court was just at this point unable to see." To the foregoing remark of the trial judge the defendant excepts, which is defendant's fifteenth exception.

Some difficulty has been experienced in arriving at a satisfactory conclusion as to what disposition should be made of this exception and assignment of error. But as it does not appear with certainty that the defendants have been prejudiced, or disadvantageously circumstanced before the jury, by the remarks of the judge, we must overrule the motion for a new trial based upon this portion of the record. "Appellant must show error; we will not presume it, but he must make it appear plainly, as the presumption is against him." *In re Smith's Will,* 163 N. C., 464. See, also, 1 Michie Digest, 695, and authorities collected under title, "Burden of Showing Error."

We are not unmindful of the recent decisions of *Morris v. Kramer,* 182 N. C., 87; *Chance v. Ice Co.,* 166 N. C., 495, and others to like effect. And it will be conceded that the instant exception, viewed from one standpoint, may be in the twilight zone, bordering near the line of reversible error; but we are not satisfied or convinced that the facts presented are sufficient to bring it under the doctrine announced in these late cases. On the other hand, it would seem that the ruling adopted in *S. v. Browning,* 78 N. C., 555, "unless it appear with ordinary certainty that the rights of the defendants have been prejudiced in some way by the remarks, or conduct of the court, it cannot be treated as error," is more nearly applicable to the case at bar. The record shows that counsel for plaintiffs were examining the witness with respect to certain interest calculations. He answered the questions about figuring the interest on the debt of $34,000; and further, without any question being asked, volunteered a statement in regard to the home place, which was not in controversy. Continuing, and of his own volition, the witness proceeded to comment on the statement of 19 April, 1919, saying: "The inference is attempted to be drawn here, as I understand it, that this is an accounting between the American Trust Company and Mr. McNinch." Here the attorney for the plaintiffs interrupted him with the question: "After figuring over the interest, if you please, I would like for you to first answer my question." Then followed argument as to the right of the witness to make his explanation, in which the witness himself joined; and it was during this argument, and not while he was testifying, that the court asked the question of which defendants complain, evidently meaning that if Mr. Whitlock were making his explanation and arguments as an attorney the court would listen to them, but, if as a witness, he would have to confine himself to the questions propounded. At least, such appears to be the more reasonable interpretation of the judge's inquiry and comment.

In *S. v. Robertson,* 121 N. C., 551, it was said: "It devolves upon the party complaining to show that the court has in some way expressed an opinion on the facts, and that it is prejudicial to him, or that it must be reasonably inferred that he was prejudiced thereby." Again, in *S. v. Brabham,* 108 N. C., 793: "Remarks by the court of doubtful propriety are not ground for exception, where it appears they did no harm to the defendant." There must be some clear proof, sufficient to overcome the opposite presumption, that an unfair effect was likely to be produced and was accomplished by what transpired, before it can be considered a violation of the statute. *S. v. Jones,* 67 N. C., 285. And to like effect are the following: *McDonald v. McArthur,* 154 N. C., 11; *Williams v. Lumber Co.,* 118 N. C., 928; *S. v. Dick,* 60 N. C., 440; *S. v. Nat,* 51 N. C., 114; *S. v. Angel,* 29 N. C., 27.

After a careful and painstaking investigation of the record, no ruling has been found which we apprehend should be held for reversible error; and this will be certified to the Superior Court.

No error.

MOUNTAIN RETREAT ASSOCIATION v. MOUNT MITCHELL DEVELOPMENT COMPANY.

(Filed 22 February, 1922.)

1. **Eminent Domain—Turnpikes—Public Use—Condemnation—Statutes—Easements.**

The taking of private lands for turnpike or toll-road purposes is for a public use, and may be acquired for such purposes by proper proceedings before the clerk of the court of the appropriate county under the provisions of C. S., 1705 *et seq.*, when the corporation has been organized under the provisions of our general incorporation law, C. S., 1113 *et seq.*, and has express charter powers to do so.

2. **Same—Private Purposes.**

The right of a corporation to condemn lands for a public use, having the statutory powers, is not affected or impaired because in the charter it may be given rights of a more private nature to which the right of condemnation may not attach.

3. **Eminent Domain—Clerks of Court—Statutes—Procedure—Courts—Jurisdiction—Writ of Prohibition—Actions—Injunction—Equity.**

Where it is properly made to appear from the petition in proceedings to condemn lands of private owners for the purpose of a turnpike road, brought before the clerk of the court of the proper county, that the petitioner is a duly incorporated company, having the right of eminent domain, and the proceedings are in conformity with the statute as to the termini, route of the proposed road, etc., an attempt by such owners to obtain an injunction by independent action is, in effect, an erroneous effort to obtain a writ of prohibition restraining the clerk of the court from exercising the jurisdiction conferred exclusively on him by statute, cognizable only in the Supreme Court, it being required that the want of authority of the petitioner to condemn the land be taken by answer in the proceedings before the clerk, C. S., 1720; and the action will be dismissed.

APPEAL by plaintiff from *Brock, J.*, at October Term, 1921, of BUNCOMBE.

Civil action, heard on return to preliminary restraining order. There was judgment for defendant, and plaintiff excepted and appealed.

Jones, Williams & Jones and Mark W. Brown for plaintiff.
Martin, Rollins & Wright for defendant.

HOKE, J. From the facts in evidence it appears *prima facie* that defendant company has been duly incorporated under the laws of this State, C. S., ch. 22, sec. 1113 *et seq.*, and having power under its charter to construct and maintain turnpike or toll roads in said State and various other powers not pertinent to the present inquiry. This being true, said company, by statutory authority and in express terms, has the right under the power of eminent domain to condemn such right of way as may be reasonably required for the purpose specified, and our decisions on the subject hold that this power of eminent domain very generally allowed and exercised in roads of this kind is in no way affected or impaired because in the charter the company may be given rights of a more private nature to which the right referred to may not attach. C. S., ch. 33, sec. 1705 *et seq.*; *Power Co. v. Power Co.*, 175 N. C., 668; *S. c.*, 171 N. C., 248; *Land Co. v. Traction Co.*, 162 N. C., 314; *Street Railway v. R. R.*, 142 N. C., 423; 5 Enc. of S. C. Reports of U. S., 761-765; Nichols on Power of Eminent Domain, sec. 218.

In the last citation (Nichols) it is said: "Toll roads, turnpikes, or plank roads constructed or managed by individuals or private corporations, at their own expense, but open to use by any member of the public on the payment of a reasonable fee have invariably been held a public use."

It further appears that, acting under the powers so conferred, the defendant company having duly determined to construct and maintain a road of this character from a point at or near Black Mountain station on the Southern Railroad to the top of Mt. Mitchell, N. C., where the State has and maintains a public park of 1,800 or more acres, has filed its petition before the clerk of the Superior Court of Buncombe County, having jurisdiction of the matter, to condemn a right of way through the lands of the present plaintiff as reasonably required for the purpose specified. In such, its petition, the defendant, after averment of the powers possessed under its charter and the purpose of establishing the road as indicated, specifying its terminal points, alleges that the route covers a distance of twenty-two miles, chiefly along an old road bed of a lumber road now disused, and petitioner has acquired and owns the entire right of way required except for distance of six miles running through the lands of the present plaintiff, and which the petitioner has been unable to acquire by purchase, etc. C. S., 1715.

Thereupon, the present plaintiff, made party defendant in the petition of the Mt. Mitchell Development Company, institutes the present action seeking to obtain an injunction restraining the said company from proceeding to condemn the right of way sought by said company through the present plaintiff's property on allegations fully set forth in its verified complaint used as an affidavit in the cause, which said allegations and averments relied on as a basis for relief are fully denied by the present defendant. Upon this a sufficient statement for a proper apprehension of the questions presented, we think the preliminary restraining order has been properly set aside, and are of opinion further that on the record the plaintiff's action should be dismissed.

The statute under which the present defendant is endeavoring to proceed contains, among others, the following provision, same being part of section 1720: "On presenting such petition to the Superior Court, with proof of service of a copy thereof and of the summons, all or any of the persons whose estates or interests are to be affected by the proceedings may answer such petition and show cause against granting the prayer of same, and may disprove any of the facts alleged in it."

Without making extended or detailed reference to the elaborate averments of the instant complaint, it will suffice to say that after very careful examination we have failed to discover a single position set forth and relied on by present plaintiff as a basis for relief which may not be made available to him under the comprehensive provisions of the statute we have just cited, and it is in that proceeding and there alone that the defenses of the plaintiff, if he have them, must be set up and established.

A proper consideration of the pleadings will show that under the guise of an action to obtain an injunction against the defendant, the plaintiff, in fact and truth, is seeking to procure a writ of prohibition restraining the clerk of the Superior Court of Buncombe County from exercising the powers and jurisdiction conferred upon him by the law in condemnation proceedings. It is the well established principle in this jurisdiction that such a writ can only be obtained by application in proper instances to this Court, and the Superior Court is without power to proceed further in such a matter. *R. R. v. Newton,* 133 N. C., 136; *S. v. Whitaker,* 114 N. C., 818; *Perry v. Shepherd,* 78 N. C., 83.

To allow a litigant, in the manner attempted here, to withdraw his case from the tribunal where the statute has placed it would in many instances operate to bring about unnecessary and undesirable delays, to obstruct unduly many beneficent enterprises required for the public weal, and thus contravene and thwart the meaning, purpose, and policy of our condemnation laws, which, as stated, have placed these questions primarily and exclusively in the jurisdiction of the clerks of the court, to be administered as the law there directs; even if a right to injunctive relief is presented, it should be obtained as an incident to the defenses set up and to be considered in the condemnation proceedings and not by an independent action. *Wilson v. Alleghany Co.,* 124 N. C., 7; *Hunt v. Sneed,* 64 N. C., 176.

This will be certified that judgment be entered dismissing plaintiff's suit, without prejudice to any rights or defenses allowed and available to him under the law, and the facts as they may be properly presented and established.

Action dismissed.

ANNIE C. HARDIN v. F. L. DAVIS.

(Filed 22 February, 1922.)

1. **Seduction—Action—Tort—Damages—Promise of Marriage—Criminal Law—Statutes.**

It is only necessary for plaintiff's recovering damages in her civil action, in tort, for wrongful seduction, to show that the defendant induced the intercourse by persuasion, deception, enticement, or other artifice; not requiring, as in prosecution under the criminal statute, C. S., 4339, that the intercourse was procured under a promise of marriage, though when existent this may be shown in the civil action as a means used by the defendant to accomplish his purpose.

2. **Same—Reformation of Female—Previous Unchastity.**

It is not required that the woman should have always been chaste and virtuous to recover damages in tort for her seduction, for it is sufficient if by her conduct and rectitude she had reformed and was virtuous and chaste at the time of the defendant's wrongful acts in procuring the seduction, for then she will have become innocent in the eyes of the law. As to whether such reformation is required in the suit of the father is not decided in this case.

3. **Seduction—Action—Tort—Evidence—Instruction—Unsupported Testimony of Prosecutrix—Appeal and Error.**

In the plaintiff's civil action to recover damages in tort for her seduction, the weight and credibility of her evidence are for the jury to determine; and an instruction in such action, as distinguished from a criminal indictment under the provisions of C. S., 4338, that her unsupported evidence is insufficient to warrant a verdict in her favor, is reversible error.

APPEAL by plaintiff from *Webb, J.*, at November Term, 1920, of CHEROKEE.

Civil action to recover damages for an alleged wrongful seduction.

The evidence of the plaintiff tended to show that the defendant, then a man twenty-six years of age, began to show plaintiff attentions and keep company with her in the year 1913, when the plaintiff was a mere child, not yet fifteen years old. These attentions were kept up by the defendant continuously until the year 1916, when the defendant seduced the plaintiff and procured her to have sexual intercourse with him, which acts of intercourse were kept up from time to time and as a result of which the plaintiff gave birth to a child. Plaintiff testified that she had never had intercourse with any one except the defendant. This was all denied by the defendant.

There was further evidence on behalf of the defendant tending to show that the plaintiff was a woman of bad character and of lewd and lascivious habits.

From a verdict and judgment in favor of the defendant, plaintiff appealed, assigning errors.

J. D. Mallonee and J. N. Moody for plaintiff.
Martin, Rollins & Wright and M. W. Bell for defendant.

STACY, J. This was a civil action to recover damages for an alleged wrongful, but not necessarily criminal, seduction. His Honor charged the jury that before the plaintiff could recover it would be necessary for her to show that the acts complained of were brought about and procured under a promise of marriage. In this we think there was error. While a promise of marriage is quite often one of the means employed by the seducer to accomplish his purpose, and necessary to be shown on a criminal indictment (C. S., 4339; *S. v. Cline,* 170 N. C., 751), yet such a promise is not one of the essential elements in a civil action for damages. *Ireland v. Emmerson,* 93 Ind., 1; *Bradshaw v. Jones,* 103 Tenn., 331; *Hood v. Sudderth,* 111 N. C., 215. Intercourse induced by deception, enticement, or other artifice will suffice; for of such is the essence of the injury. 24 R. C. L., 734; 35 Cyc., 1309. But the mere proof of intercourse, and no more, is not sufficient to warrant a recovery. *Volenti non fit injuria. Patterson v. Hayden,* 17 Ore., 238.

There was a further charge to the effect that the plaintiff must have been an innocent and virtuous woman at the time of the seduction. The instruction with respect to her present virtue and chastity, we apprehend, was correct (*Greenman v. O'Riley,* 144 Mich., 543); but the requirement of innocence in the sense of absolute freedom from intercourse at any time prior thereto (*S. v. Ferguson,* 107 N. C., 841), was more than the law imposes in an action of this kind. A woman may become unchaste and then reform, and thereafter "tread the straight and narrow path" and lead an upright life. She thereupon regains her virtue, and may also become an innocent woman in the eyes of the law and in the sense these words are used in legal parlance. *S. v. Johnson,* 182 N. C., 883, and cases there cited. If she then be seduced, there would seem to be no valid reason for denying her the right to sue for damages. *Franklin v. McCorkle,* 16 Lea (Tenn.), 609. But her reformation must have taken place prior to the alleged seduction, in which event, her previous unchastity would affect only the measure of damages. *Smith v. Milburn,* 17 Iowa, 30. As to whether reformation would be necessary where a father sues for the seduction of his minor child is not decided here, nor are we presently concerned with the requisites of such a suit. For information, however, see 24 R. C. L., 735, and 35 Cyc., 1304.

There was also an additional charge to the effect that the unsupported testimony of the woman would not be sufficient to warrant a verdict in her favor. This, we think, was prejudicial to the plaintiff's cause. In a civil action of this kind the weight of the evidence and the credibility of the witnesses rest entirely with the jury. *Shell v. Roseman*, 155 N. C., 90. The defendant is not charged with a criminal offense under C. S., 4338; but his Honor seems to have tried the case upon the theory of a criminal prosecution. The plaintiff, however, has elected to sue in tort.

For the reasons assigned, the cause must be remanded for another trial.

New trial.

APPENDIX.*

COOK v. MANUFACTURING COMPANY ET AL.

(Filed 22 February, 1922.)

1. **Employer and Employee—Master and Servant—Rules—Dangerous Instrumentalities.**

   There was sufficient evidence in this case to show that a rule of defendant company required its employees operating a smaller of one of two engines at its plant to give warning to the plaintiff while at work in a dangerous position, under circumstances frequently recurring, and not dangerous when the machinery was idle, that they were about to start the engine.

2. **Same—Nondelegable Duties—Fellow-servants—Safe Place to Work.**

   Held, there was evidence in this case that the omission of the defendant's employees to warn the plaintiff that they were about to start the engine to operate the machinery was the proximate cause of the injury in suit, and that to give such warning was a nondelegable duty of the defendant, rendering untenable the defense that the negligence was that of the plaintiff's fellow-servants alone, and not attributable to the master, under the facts and circumstances of this case.

Petition by defendants to rehear this case, reported in 182 N. C., 205.

J. O. Carr, George Rountree, and H. L. Stevens for petitioners.

Stacy, J. This was an action brought by the plaintiff, an employee of the defendants, or one of them, to recover damages for an alleged negligent injury. The defense is that of contributory negligence and the "fellow-servant rule." There is no other plea of assumption of risk. *Dorsett v. Mfg. Co.,* 131 N. C., 261.

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*Conclusions of Mr. Justice Stacy upon denying a petition to rehear this case reported in 182 N. C., 205.

Upon trial in the Superior Court, there was a judgment as of nonsuit, at the close of plaintiff's evidence, which was entered on the theory that the only negligence shown was that of a fellow-servant, involving no liability of the master. Plaintiff appealed. A new trial was awarded and the judgment of nonsuit reversed on the ground that some evidence had been offered tending to show a dereliction of duty on the part of one or both of the defendants. We are now asked to grant a rehearing of the case, to the end that our former decision may be reconsidered, if not overruled.

The alpha and omega of every case must be determined by the facts. What are they here?

1. The defendants (or at least the Camp Manufacturing Company) own and operate a large sawmill and lumber manufacturing plant near the town of Wallace, N. C. Eight high-powered boilers, with the same number of furnaces, are run and used in connection with said establishment. To a considerable extent sawdust is used as fuel in feeding these furnaces, and the same is conveyed from the sawdust pile, or dust house, by means of a dust-chain or conveyor, which is operated by a small engine; and this engine is stationed in an out-house or one somewhat apart from the main buildings of the plant.

2. Plaintiff was employed as chief engineer of the mill, and had been working as such for about six months. It was his duty to inspect, examine, keep in repair, and care for the machinery, including all chains, pulleys, and engine equipment. To use his own language: "I was what you might call general repair man, but I did not operate or run the machinery. I had authority to stop the engines when I wanted to make repairs."

3. The dust-chain required attention, and sometimes repairs, on an average of two or three times a day, because of knots, slabs, etc., clogging and interfering with its operation. In working on this chain it was necessary to stop the engine, by which it was run, and the machinery to which it was attached.

4. Henry Peterson was fireman and looked after the large boilers. John Southerland (colored) was his helper and dust-cutter. The latter generally operated this small engine which ran the dust-chain.

5. It was also alleged that the defendants "failed to furnish the plaintiff with sufficient helpers; and negligently and carelessly failed to have said engine properly manned and properly operated with skillful and competent fireman and helper," etc. (*Pigford v. R. R.,* 160 N. C., 93.)

6. In starting and stopping the machinery in the sawmill proper, the defendants employed a system of whistle signals in giving notice or warning to the employees of such operation of the machinery; but there was no such system used in connection with starting and stopping the small engine which ran the dust-chain.

7. On 13 July, 1918, the plaintiff, discovering that something was wrong with the dust-chain, stopped the small engine and told Peterson and Southerland (speaking to both in person) not to start it again until he came out and notified them. Plaintiff then went to the rear of the dust house, and, upon investigation, found that a lightwood knot had lodged in the dust-chain. While undertaking to remove this "kink," as he called it, John Southerland, without warning and at the direction of Henry Peterson, started the small engine and the plaintiff was caught in the chain or conveyor and seriously and permanently injured. Southerland left the small engine, after the plaintiff had notified him not to start it again until he came out, and was away for about 25 minutes. Upon his return, Peterson told him to start up the engine and cut some dust. Southerland asked if the plaintiff had gone, and Peterson replied, "Yes, he has gone out." Neither was in a position to see the plaintiff at this time, as there was a partition between the dust house and the engine room.

8. There was evidence tending to show an established custom or rule that when the plaintiff had stopped an engine for the purpose of repairing any part of the machinery, it should not be started again until he gave the proper notice. Plaintiff testified: "When I stopped an engine the rule was that it was not to be started until I told them. This particular engine was stopped running maybe two or three times a day, some knots or things would get in there, and I would stop the engine and go and notify the men that I had stopped it; that was understood between me and the fireman."

Defendants earnestly contend that this was only an understanding between the plaintiff and the fireman and not a rule of the company. But it is alleged in the answer, as a matter of defense, that the plaintiff "knew when he went to work on the chain it was his business to notify all the other employees not to start the engine, and that on this occasion he failed and neglected to notify Southerland, or any other employee, that he was working on the chain and not to start up the engine, and his failure so to do was negligence, which proximately contributed to his injury." Why this allegation, if such duty were not imposed by a rule of the company? Obviously, the defendants must have realized that the plaintiff's position was one of peril and danger, or else this plea of contributory negligence would not have been made. At any rate, there was evidence from which the jury might have found that such was an established rule of the company. And if it were the "business" of the plaintiff to give such notice—which seems to have been given—does it not follow that the defendants owed a corresponding duty to the plaintiff to see that the notice was obeyed? "It is the duty of the master to use reasonable care to see that the rules adopted by him for the safety of his servants are complied with; and, if he fail to do so, he will be responsible for injuries resulting from noncompliance therewith." 26 Cyc., 1159.

The defendants reply to this last question, however, by saying that even if Southerland and Peterson were negligent in starting the engine, such was only the negligence of one or more fellow-servants, and for which the defendants cannot be held liable under the doctrine announced in *Kirk v. R. R.*, 94 N. C., 625. Possibly it would be well to observe that in the *Kirk case* "it was admitted by counsel for plaintiff that Harris, the engineer, Brown, the fireman, Thompson, the yardmaster, and Smith (the negligent employee), his assistant, were fellow-servants of the plaintiff." Furthermore, the negligence of Smith was the only evidence of negligence before the court. But in the case at bar it is not admitted that Peterson and Southerland were fellow-servants of the plaintiff, with respect to the enforcement and observance of the rule which had been adopted expressly for the plaintiff's safety and protection. We are not now concerned with what their status or relation may have been in regard to other matters. Plaintiff contends that Southerland was the *alter ego,* or vice principal, of the master in caring for his safety while in a position of peril, especially as no system of signals had been adopted for the starting and stopping of this small engine. Plaintiff says that a reliance upon this rule was his only means of protection, that such was known to the defendants, and that it proved to be unsafe through no fault of his. Herein lies one of his allegations of negligence, and there are others.

The rigorous rule of the fellow-servant doctrine, as it once obtained, has been greatly modified in recent years. Speaking to this question, *Brown, J.*, in *Tanner v. Lumber Co.*, 140 N. C., 475, makes the following pertinent observation: "The true rule now is more humane and holds the master is liable for negligence in respect to such acts and duties as he is required, or assumed to perform, without regard to the rank or title of the agent intrusted with their performance. As to such acts, the agent occupies the place of the master, and he is liable for the manner in which they are performed. *Flake v. R. R.*, 53 N. Y., 549; *Crispin v. Bobbitt,* 81 N. Y., 521. If the negligent act of one servant is done in the discharge of some positive duty which the master owed to another servant, then negligence in the act upon the part of the servant is the negligence of the master.

"This principle of the law of master and servant is laid down in many adjudications. *R. R. v. Baugh,* 149 U. S., 368; *R. R. v. Seeley,* 54 Kan., 21; *Minneapolis v. Lunden,* 7 C. C. A., 344; *Coal & Coke Co. v. Peterson,* 136 Ind., 398; *Justice v. Pa. Co.,* 130 Ind., 321; *Hough v. R. R.,* 100 U. S., 215. The Supreme Court of Pennsylvania thus expresses it: 'Whenever it is sought to hold the master liable for the act or neglect of his foreman, the question to be first considered is whether the negligence complained of relates to anything which it was the duty of the master to do. If it does, then the master is liable, for he must see, at his peril, that his obligations to the workmen are properly discharged.' *Ross v. Walker,* 139 Pa., 42; *Gunter v. Granville Mfg. Co.,* 18 S. C., 270."

In *Nor. Pac. R. Co. v. Peterson,* 162 U. S., 346, *Mr. Justice Peckham* gives the following full, clear, and accurate statement of the law: "The general rule is that those entering into the service of a common master become thereby engaged in a common service and are fellow-servants, and *prima facie* the common master is not liable for the negligence of one of his servants which has resulted in an injury to a fellow-servant. There are, however, some duties which a master owes, as such, to a servant entering his employment. He owes the duty to provide such servant with a reasonably safe place to work, having reference to the character of the employment in which the servant is engaged. He also owes the duty of providing reasonably safe tools, appliances, and machinery for the accomplishment of the work necessary to be done. He must exercise proper diligence in the employment of reasonably safe and competent men to perform their respective duties, and it has been held in many states that the master owes the further duty of adopting and promulgating safe and proper rules for the conduct of his business, including the government of the machinery and the running of trains on a railroad track. If the master be neglectful in any of these matters, it is the neglect of a duty which he personally owes to his employee, and if the employee suffer damage on account thereof, the master is liable. If, instead of personally performing these obligations, the master engages another to do them for him, he is liable for the neglect of that other, which, in such case, is not the neglect of a fellow-servant, no matter what his position as to other matters, but is the neglect of the master to do those things which it is the duty of the master to perform as such."

Where the master orders the servant into a situation which may become dangerous by the starting of machinery, or the acts of other servants, it becomes the duty of the master to use reasonable means to guard against such contingencies. *Cristanelli v. Mining Co.* (Mich.), 117 N. W., 910; *Comrade v. Lumber Co.,* 44 Wash., 470. In the last case just cited it was held that an engineer, whose duty it was to give a warning by two blasts of the whistle before starting the machinery in a mill, so that other employees might remove themselves from positions of danger, was not a fellow-servant of a saw-filer, engaged in filing saws during the noon hour while the machinery was at rest, since the giving of such warning was one of the nondelegable duties of the master. *Crow, J.,* speaking for the Court, said: "We are not prepared to say that the engineer would, under no circumstances, be a fellow-servant of respondent and other employees in the mill. But under the facts here disclosed, we hold that in the matter of giving some proper warning before starting the mill, he was a vice principal of the appellant and not a fellow-servant of the respondent." To like effect is the decision in *Illinois Steel Co. v. Ziemkowski,* 220 Ill., 324, where it was held that one charged with the duty of giving warning to the employees of a steel mill when a blast was to be blown, in order that they might reach a place of safety, is a vice principal of the master with respect to the duty of giving such warning.

"The line of demarcation," says *Judge Sanborn* in *St. Louis I. M. & S. R. Co. v. Needham,* 63 Fed., 107, "between the absolute duty of the master and the duty of the servants is the line that separates the work of construction, preparation, and preservation from the work of operation." And this is cited with approval in *Peterson v. New York, etc., R. Co.,* 77 Conn., 351, and 26 Cyc., 1321.

In the case at bar it would seem that the work in which the plantiff was engaged at the time of his injury was that of preservation and repair, and not merely the execution of a minor detail of operation. However, the character of his work, even according to the above standard, is not to be the sole criterion or determining factor, but this must be considered in connection with that of the other employees. Endeavoring to meet the position thus presented, the defendants say that Southerland's alleged negligence, as well as that of Peterson's, was the result of an act or acts done, or omitted to be done, in the ordinary and regular course of running the mill; and that, as such, they were only the acts of fellow-servants, entailing no further or additional liability on them. Herein lies the difficulty of differentiating between the alleged dereliction, which constitutes the real basis of plaintiff's cause of action, and the other duties of these employees not now essential to our consideration. The mental confusion which has lead to many discordant adjudications on the subject (*Ell v. N. P. R. Co.,* 1 N. D., 336), doubtless arises out of, and probably is produced by, momentarily losing sight of the plaintiff's safety, and the duty which the defendants owed to him, while thinking of the relation existing between the plaintiff and the other employees. But on mature reflection, the distinction, which at first may not appear obvious, becomes sharp and clear-cut. It is true Peterson and Southerland occupied the positions of fireman and helper or dust-cutter, respectively, and they were charged with the duty of running the engines and boilers. But when such operation, or any part thereof, had been stopped or suspended, in order that the plaintiff might do his work, the obligation to keep such idle machinery stationary was one of the primary duties which the defendants owed to the plaintiff in undertaking to furnish him a reasonably safe place to work. The proximate cause of the plaintiff's injury, therefore, was the alleged negligent failure of the defendants to keep the machinery still (just the reverse of operation); and this clearly related to the duty of maintaining and preserving for the plaintiff a reasonably safe place in which to do his work. "The positive, personal, and nondelegable duty of a master to provide a reasonably safe place in which, and reasonably safe appliances with which to work, or a reasonably safe method of doing the work, is a duty of construction and provision, and not of operation." *Kinnear Mfg. Co. v. Carlisle,* 152 Fed., 933. Maybe the jury will find that in the instant case this duty has been properly discharged, and maybe not. At any rate, it is a question for them.

It is not necessary to say, nor is it here said, that, under all circumstances, the duty of the master to warn his servant of impending danger is absolute and nonassignable. This must be determined by the attendant facts and the degree of danger present in each particular case. It is now the generally accepted rule, however, that when an employee is at work in a place, reasonably safe within itself, but which, by virtue of some independent work done for the master's purposes, becomes highly dangerous, unless the customary warning or signals be given and observed, and the master has committed the execution or observance of such signals or notices to another, the person so charged with this particular duty, in this one respect if no other, is a vice principal and stands as the personal representative of the master. For his negligence in this regard, in the absence of any contributory negligence on the part of the plaintiff, the master is liable; because such is a positive legal obligation, and he is responsible for its negligent performance, whether he undertakes it personally or delegates it to another. *Nelson v. Navigation Co.,* 26 Wash., 548 (where a steamboat mate united a gang-plank, but negligently failed to give customary warning before letting it slide to the deck, to the injury of a deck-hand); *O'Brien v. Page Lumber Co.,* 29 Wash., 537 (applying a "nigger" to a log in a sawmill without warning to plaintiff "dogger"); *Hough v. Light & P. Co.,* 41 Ore., 531 (failure to warn lineman of turning on electric power); *Postal Tel. Cable Co. v. Likes,* 225 Ill., 249; *Pautzar v. Mining Co.,* 99 N. Y., 368 (failure of master to warn servant at work in mine of danger from rock liable to fall); *Fitzgerald v. Twine Co.,* 104 Minn., 138 (plaintiff engaged in splicing a strand of flax on a machine at rest, was injured by the starting of the machinery without the usual signal); *Hjelm v. Contracting Co.,* 94 Minn., 169 (injury by a rock thrown by a blast, through the negligence of the servant to give customary notice); *Lohman v. Swift & Co.,* 105 Minn., 148 (plaintiff injured by the sudden starting of machinery which he was engaged in repairing); *Cody v. Longyear,* 103 Minn., 116 (injury caused by the starting of a diamond drill without warning); and finally, *Anderson v. Pittsburg Coal Co.,* 108 Minn., 455, which contains a valuable and exhaustive discussion of the entire subject in all of its phases.

It is conceded that the authorities elsewhere on the subject now in hand, especially those of a comparatively remote date, are in sharp conflict. "The trend of modern decisions, however, is in favor of holding the employer liable for a neglect of monitory signals as well as general instruction." 18 R. C. L., 734. See, also, notes in 46 L. R. A. (N. S.), 766; 26 L. R. A. (N. S.), 624; 4 L. R. A. (N. S.), 1161, and *Pressly v. Yarn Mills,* 138 N. C., 410.

In a number of recent cases the liability of the master has been made to turn not so much upon the difference in rank, or the relation existing between the employees, as on the character of the negligent act. If the act were one done, or omitted to be done, in the discharge of some positive duty, which the master owed to the servant, then the negligence of the offending servant in this respect was held to be the negligence of the master. *R. R. v. Baugh,* 149 U. S., 368; *Carter v. McDermott,* 29 App. D. C., 145; 10 L. R. A. (N. S.), 1103, and note. In *Hunter v. Alderman,* 89 S. C., 502, *Mr. Justice Woods* states the rule as it obtains in South Carolina as follows: "In determining who are fellow-servants, the test or rule in this state is not whether the servants are of different grade, rank, or authority, one of them having power to control and direct the services of another, but the test is in the character of the act being performed by the offending servant, whether it was the performance of some duty which the master owed to the injured servant, the performance of which duty the master intrusted to the offending servant." And this is the same test which was laid down by *Mr. Justice*

Brown in *Tanner v. Lumber Co.,* 140 N. C., 475: "It follows, therefore, from all the modern authorities that Hitch's liability for Richardson's alleged negligence is not to be determined by the latter's authority to hire and discharge hands, or to purchase and change machinery, and the like. The true test is whether Richardson was intrusted by Hitch with the performance of any duty that Hitch owed to the plaintiff. If he was, and failed to perform it, the defendant is liable." Again, in *Shives v. Cotton Mills,* 151 N. C., 290: "The duty of providing a reasonably safe place in which to work is one of the primary or absolute duties of the master; and when the master delegates the discharge of such duty to a servant, whether he be called foreman, a superintendent, or what not, he represents the master, and the latter will be held responsible for the manner in which the duty is discharged." The same rule also obtains in the District of Columbia: "If an act is done in the discharge of some positive duty of the master to the servant, then negligence in the performance of the act is negligence of the master, notwithstanding that it was performed through another servant." *Spates v. Wells Bros.,* 43 App. D. C., 555.

This is not an abrogation of the fellow-servant rule, but a differentiation of two principles equally well established. As said by *Mr. Justice Holmes* in *Beutler v. Railway,* 224 U. S., 85: "The doctrine as to fellow-servants may be, as it has been called, a bad exception to a bad rule, but it is established, and it is not open to the courts to do away with it upon their personal notions of what is expedient." The Legislature alone may bring about its abolition or change. But because the correct principle of a given case may be difficult of application is no reason why it should not be made. Where the question has become nebulous or beclouded on account of conflicting judicial decisions, it behooves the courts, for this very reason, to search more earnestly and diligently for the truth.

Again, if the negligence of the master concur with that of a fellow-servant in causing an injury, both the master and the servant are liable. *Ammons v. Mfg. Co.,* 165 N. C., 449; *Wade v. Cont. Co.,* 149 N. C., 177. Where the master has negligently failed to perform one of the primary duties which he owes to the servant, and this negligence concurs with that of a coemployee in proximately producing the injury, the master's responsibility therefor is the same as if his negligence were the sole and only cause. *Steele v. Grant,* 166 N. C., 635, and cases there cited.

In the opinion of the Court, written by the *Chief Justice, Ondis v. Tea Co.,* 82 N. J. L., 511, is cited as a persuasive authority. Counsel, in their petition to rehear, make the following criticism, or rather, observation, of this case: "The work which the plaintiff was set to do was so inherently dangerous, when the machinery was started, that there had been *a rule or custom established to warn the employee before the machinery was started*, and this was not done and the employee was seriously injured. The defendant was held to be liable. This explanation of the case is given in a note in 46 L. R. A. (N. S.), 771, and is manifestly correct." In the cited case, Ondis was bailing water from a pit, which was not dangerous when the machinery was motionless. The starting of the machinery made his position one of immediate peril. It was a rule that this should not be done without notice or warning to him. In the case at bar the plaintiff was repairing a dust-chain, which was not dangerous so long as the machinery was at rest. The starting of the engine made his position one of immediate peril. There is evidence that, according to the rule, this was not to be done until the plaintiff himself gave the customary notice. In principle there appears to be no difference or dissimilarity in the two cases. The analogy would seem to be complete.

Considering all the facts and circumstances of the instant case, I think the question of liability is one for the jury, under proper instructions from the court, and that the motion for judgment as of nonsuit should have been overruled.

It is needless to add that the foregoing is in no way binding on this Court. It represents my investigation on the petition to rehear, and is intended only as a memorandum of the reasons why I think the petition should be denied. Entirely a work of supererogation and of little service, no doubt; but possibly it will suffice to show that, contrary to the allegations of the petition, the Court has not "misconceived the case by misunderstanding the essential facts." Nothing on the record has been overlooked.

Petition denied.

IN RE HAMILTON.

(Filed 1 March, 1922.)

Juvenile Courts—Statutes—Courts.

PETITION to rehear this case, reported in 182 N. C., 44.

Tooly & McMullen for petitioner.

Ward & Grimes and Small, MacLean, Bragaw & Rodman for respondents.

STACY, J. This case was before us at the last term, and we are now asked by petitioner to reconsider our original decision, upon the ground that in *Atkinson v. Downing,* 175 N. C., 244, and *In re Fain,* 172 N. C., 791, it was suggested by *obiter dicta* that the ruling in *Stokes v. Cogdell,* 153 N. C., 181, might not be held as a controlling authority in future cases of this kind. But on mature reflection, and especially in view of the recent legislative policy as declared in the act creating the juvenile courts (C. S., 5039 *et seq.*), we are of opinion that the position originally announced in this case and as formerly declared in *Stokes v. Cogdell, supra,* must be reaffirmed and followed. There is nothing in the case of *In re Warren,* 178 N. C., 43, or in the case of *In re Means,* 176 N. C., 307, which militates against this position.

Petition dismissed.

WALKER, J., dissents.

WILLIAM EDWARDS v. NASH COUNTY BOARD OF COMMISSIONERS.

(Filed 22 February, 1922.)

1. **Constitutional Law—Statutes—Taxation—Ratifying Acts—Retroactive Acts—Vested Rights.**

   The Legislature, having the power to authorize a county to levy a special road tax for the purpose of coöperating in the construction of State or National highways in the county, may validate, by retroactive legislation, an attempt of the municipal authorities to levy this tax after the expiration of the period fixed in the prior act, when in the ratifying act there is no attempt to legalize prior legislation, or a prior invalid seizure or sale of property thereunder, or to interfere with vested rights.

2. **Constitutional Law—Statutes—Taxation—Reading of Bill—Substitute Bill—Separate Days—Roads and Highways.**

   Where a bill, authorizing a levy of taxes for road purposes, has been read, referred to a committee, and the committee has recommended a substitute, resulting in the tabling of the original bill and the passing of the substitute on two separate days in that branch of legislation, and otherwise conforming to the requirements of Const., Art. II, sec. 14, as to the "aye" and "no" vote, etc., and its passing on separate days, etc., in both branches of legislation, the substitute is to be regarded, in the contemplation of the Constitution, as an amendment to the original bill introduced, and the act may not successfully be questioned as not having passed on the several separate days required of a bill of this character.

APPEAL from an order dissolving a restraining order, heard by *Allen, J.,* at chambers, 20 December, 1921, from NASH.

Civil action permanently to enjoin defendant from levying road tax in Nash County, and from increasing road tax in Manning's Township in said county. On 1 December, 1921, a temporary restraining order was granted, and on 20 December it was dissolved. Plaintiff appealed. There were two alleged causes of action:

1. Plaintiff contends that in 1921 defendant levied a tax of ten cents on each $100 in value of property in Nash County, which was unconstitutional for the reason that Public-Local Laws 1919, ch. 496, under which the levy was made, did not authorize the defendant to levy this tax after 1920. The defendant contends that the levy of 1921 was validated by the General Assembly at the special session of 1921, H. B. 92, S. B. 735. The plaintiff insists that the act of 1921 is inoperative because the General Assembly could not "validate a nullity."

2. The plaintiff contends, in the second place, that in Manning's Township the defendant levied a tax in excess of the authority granted by Public-Local Laws 1913, ch. 220. The defendant says that the increased rate was authorized by Public-Local Laws 1919, ch. 245; and plaintiff insists that the latter act was not passed in accordance with Art. II, sec. 14, of the Constitution. This statement is sufficient to show the contentions of the parties.

W. M. Person for plaintiff.
F. S. Spruill for defendant.

ADAMS, J. The appeal involves the legal integrity or soundness of the two propositions on which the plaintiff relies. The first is this: Whatever the legislative intent may have been, the act passed by the General Assembly at the special session of 1921 is not legally sufficient to validate the levy which was made by the defendant for that year by virtue of chapter 496 of the Public-Local Laws of 1919. And the second: The act (Public-Local Laws 1919, ch. 245) amending chapter 220 of the Public-Local Laws of 1913 was not passed as required by Art. II, sec. 14, of the Constitution of North Carolina. We are of opinion that neither proposition can be maintained.

Chapter 496, section 3, of the Public-Local Laws of 1919, authorized the defendant, in certain contingencies which are not material here, to levy for coöperation in the construction of State or National highways in the county a special tax for the years 1919 and 1920; and the defendant, under the impression that the act provided for a permanent fund, in July, 1921, levied the tax referred to. For the purpose of curing the defect and ratifying the levy, the General Assembly, at the special session of 1921, passed an act, the title of which is "An act to amend and supplement chapter 496 of the Public-Local Laws of 1919, and to ratify and validate the action of the county commissioners of Nash

County in levying a tax thereunder for the public roads of said county." Section 3 provided that the action of the defendant in levying a tax of ten cents on the $100 valuation of property and of thirty cents on each taxable poll for the year 1921, in pursuance of the provisions of chapter 496, and for the purpose therein expressed as amended, should in all respects be approved, ratified, and validated. The plaintiff contends that since the defendant had no authority to make the levy at the time, the act of 1921 is only an ineffective effort to impart vital force to a levy that was utterly void. But the authorities apparently are uniform in holding that where there is no attempt to legalize prior litigation, or a prior invalid seizure or sale of property, or to interfere with vested rights, a statute enacted to confirm or validate a defective assessment of taxes is not in violation of the organic law, and is, therefore, effective for the purpose intended. This conclusion rests upon the recognized and accepted doctrine that a retrospective law, curing defects in acts that have been done, or authorizing or confirming the exercise of powers, is valid in those cases in which the Legislature originally had authority to confer the power or to authorize the act. The General Assembly unquestionably had original authority to confer the right to levy a tax for the year 1921, in like manner as it had done for the two preceding years. It may be noted that there is no suggestion that chapter 496, heretofore referred to, was not passed in strict compliance with Art. II, sec. 14, of the Constitution. *Belo v. Comrs.,* 76 N. C., 489; *Leak v. Gay,* 107 N. C., 479; *Scott v. Springs,* 132 N. C., 549; *Anderson v. Wilkins,* 142 N. C., 159; *Wharton v. Greensboro,* 149 N. C., 63; *Highway Com. v. Webb,* 152 N. C., 711; *Erskine v. Nelson,* 27 L. R. A., 696, and note; *Bulkeley v. Williams,* 48 L. R. A., 465, and note, p. 476; 12 C. J., 955, 1095.

In the second proposition the plaintiff assails the constitutionality of chapter 245 of the Public-Local Laws of 1919. "No law shall be passed to raise money on the credit of the State, or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or allow the counties, cities, or towns to do so, unless the bill for the purpose shall have been read three several times in each house of the General Assembly and passed three several readings, which readings shall have been on three different days, and agreed to by each house respectively, and unless the yeas and nays on the second and third readings of the bill shall have been entered on the Journal." Const., Art. II, sec. 14. Against the constitutionality of the act referred to the plaintiff urges his contention that the bill did not pass the three several readings on three different days. This bill (H. B. 92) was introduced in the House of Representatives on 16 January, 1919, and referred to the appropriate committee; and on 19 February the committee reported the bill unfavorably, and recommended the adoption of a substitute. On 20 February, H. B. 92 was reached on the calendar, and "the substitute was adopted and the bill passed its second reading." On the day following, "the substitute for H. B. 92 passed its third reading." On each reading the yeas and nays were entered in the Journal. The bill, or substitute, was then sent to the Senate, and passed by that body in conformity with the constitutional requirements; and on 3 March it was signed by the presiding officer of each house. It may now be observed that the plaintiff's specific and dominant objection is that when H. B. 92 was tabled the substitute became an entirely new bill, that the adoption of the substitute was its first reading, and that the first and the second readings of the new bill occurred on the same day. We need not travel abroad in search of precedent to show that this position cannot be sustained. In *Brown v. Comrs.,* 173 N. C., 599, it appears that the bill which was there under discussion passed the first reading in the House of Representatives, and was referred to a committee, who reported a substitute for the original measure. *Brown, J.,* said: "The substitute was only an amendment to the original bill, which had already passed first reading on 22 January. Consequently, when the substitute passed second and third readings on different days, and the ayes and noes were duly entered on both said readings, the requirements of Art. II, sec. 14, of the Constitution were duly complied with." And in 25 R. C. L., 880, it is said: "Even a substitute bill which is so germane to the original bill as to be a proper substitute need not be read three times."

In this action the only defendant is the board of commissioners. The plaintiff sought to enjoin the levy of taxes four months after the levy had been completed and two months after the tax books had been delivered to the collector. *Harrison v. Bryan,* 148 N. C., 315; *Moore v. Monument Co.,* 166 N. C., 211; *Kilpatrick v. Harvey,* 170 N. C., 668. There is no phase of the record which entitles the plaintiff to an injunction, and accordingly the judgment is

Affirmed.

JULIA PRESTON v. JULIAN G. ROBERTS.

(Filed 22 February, 1922.)

Public Officers—Women—Justices of the Peace—Deputy Clerks—Deeds and Conveyances—Probate—Adjudication—Registration—Statutes.

A woman is qualified to act as a notary public since the adoption of the amendment to the Constitution of this State, Art. VII, sec. 7; and also to pass upon the proper probate of a deed to lands, and make a valid certificate for its registration, when thereto deputized by the clerk of the Superior Court under the provisions of our statutes, C. S., 935, 3305.

CONTROVERSY without action, heard 27 January, 1922, by *Harding, J.,* at chambers in the city of Charlotte, on case agreed, from MECKLENBURG.

The defendant, on 21 January, 1922, executed and delivered to the plaintiff a deed conveying a lot in the third ward; the defendant acknowledged the execution of the deed before Miss Mary Newman, who was a notary public; and thereafter Mrs. N. B. Purse, a regularly appointed deputy clerk of the Superior Court, adjudged the probate to be in due form and according to law. Upon such acknowledgment and probate the deed was registered in the office of the register of deeds of Mecklenburg County. The legality of the acknowledgment and probate was assailed. The court held that the deed had been properly acknowledged and probated, and from the judgment rendered the plaintiff appealed.

E. R. Preston for plaintiff.

ADAMS, J. As to the formula of the acknowledgment and of the probate there is no controversy. The execution of all deeds of conveyance may be proved or acknowledged before a notary public (C. S., 3293), and the clerk of the Superior Court is authorized to appoint a deputy, who may probate deeds and other conveyances. C. S., 935, 3305; *Piland v. Taylor,* 113 N. C., 1. The appeal, therefore, presents the simple question whether a woman is now disqualified to serve in the capacity of notary public or deputy clerk. In *S. v. Knight,* 169 N. C., 334, it was held that the position of notary public is a public office, and that women were precluded from holding this office because they were not legally qualified voters (Const., Art. VI, sec. 7); and in *Bank v. Redwine,* 171 N. C., 559, it was plainly suggested that for the same reason a woman could not hold the position of deputy clerk. The disqualification upon which these decisions were based has since been removed by the adoption of the Nineteenth Amendment to the Federal Constitution, which became effective on 26 August, 1920, and subsequent legislation. Fed. St. Anno., Sup. 1920, p. 821; Public Laws of North Carolina, 1919, ch. 129; Public Laws of North Carolina, extra session 1920, ch. 93; amendment to Constitution of North Carolina, Art. VI, sec. 4, effective January, 1921. "Every voter in North Carolina, except as in this article disqualified, shall be eligible to office." Const., Art. VI, sec. 7. The mere fact that the notary public and the deputy clerk who respectively took the acknowledgment and the probate of the deed were women does not invalidate the conveyance. The judgment of the Superior Court is therefore

Affirmed.

GROVER D. MODLIN v. T. L. SIMMONS AND L. D. HARPER, TRADING AS THE CHANDLER SALES COMPANY.

(Filed 22 February, 1922.)

1. **Negligence—Evidence—Res Ipsa Loquitur—Prima Facie Case—Automobiles—Repairing—Gasoline.**

Where the servant of a repairer of an automobile for the owner undertakes in the course of his employment to clean the car with gasoline in an open container, while the batteries were exposed and likely to be started in operation and emit electrical sparks that would explode the gasoline or its vapors and wreck the car, and an explosion consequently results, in the owner's action for damages against the proprietor of the garage the circumstances make out a *prima facie* case of negligence.

2. **Negligence—Evidence—Res Ipsa Loquitur—Burden of Proof.**

Where a *prima facie* case of negligence, under the doctrine of *res ipsa loquitur,* has been established in an action to recover damages, the burden of proof remains on the plaintiff throughout the trial, the question for the jury to determine being whether thereunder upon the whole evidence the plaintiff has established the negligence alleged as a fact, the *prima facie* case otherwise being sufficient to sustain an affirmative finding.

APPEAL by defendants from *Allen, J.,* at the December Term, 1921, of EDGECOMBE.

This suit was brought to recover damages for the burning of an automobile, which plaintiff had left with the defendant to be repaired and cleaned, upon the allegations of negligence as alleged in the complaint. After the evidence was all in, the arguments finished, and the charge to the jury half delivered, plaintiff was given permission to amend his complaint so as to allege that the automobile was placed in charge of an inexperienced and incompetent laborer, whose negligence, from his incompetency, caused the injury.

Defendant contends that there was no evidence to support such allegation. The judge's right to permit the amendment is not being questioned.

Thorne & Thorne for plaintiff.
F. S. Spruill for defendant.

WALKER, J. There are really but two questions in this case: first, as to whether there is any evidence that the defendant, "The Chandler Sales Company," assigned an inexperienced and incompetent man to do the work of repairing and cleaning the car of plaintiff, and whether by reason thereof and of the negligence of the defendant's servant it caught fire from a spark which came in contact with the highly inflammable gasoline with which the cleaning was being done, and the car was burned so that it became useless and practically of no value to the plaintiff. The particular act of negligence alleged on the part of defendant and its repairer and cleaner, who was doing the work for it, being that the latter got a bucket about two-thirds full of gasoline for the purpose of cleaning the car, and set it down near the car, which was allowed to remain fully wired, and ready for the transmission of electricity. After stating that the car had been left with the defendant to be repaired and cleaned, the plaintiff thus alleges the different negligent acts: In order to have the work done, the defendant negligently, carelessly, and without the exercise of ordinary care, put to do the work, which, among other things, was to wash and clean the base of the motor of the automobile, an ignorant and inexperienced servant, who proceeded or undertook to wash the base of the motor of the automobile and its other parts with gasoline. The gasoline being contained in an open tin quart container. The base of the motor was left in its place in the frame of the car at the time of undertaking to do such work, and all the wiring from the generator to the batteries, and the wiring and connections from the batteries to the lights of the car were left fully connected with each other and with the magneto so that at a very slight turn of the shaft of the automobile, or contact made with the generator by metal or other conductor, it would spark all of the said apparatus and wires, being fully charged with and ready for the transmission of electricity so that to use gasoline at such time and manner would almost necessarily result in an explosion. And further, the said agent and servant, at the same time, and notwithstanding the visible and obvious danger and risk of doing so, undertook and did in part wash and clean the said parts with gasoline, pouring the gasoline on such parts from the open tin quart container, the crank case of the automobile being placed under the motor in the form of an open, exposed basin for the purpose of catching the overflow of gasoline. In consequence of the negligence and carelessness of the defendants in doing, or undertaking to do, the business of washing and cleaning the base of the motor of the automobile in the way and manner herein stated at a time when the electric wiring of said automobile was connected with the generator, batteries, and lights, and the ignorance and incompetence of the workman who was left in charge of the business, as aforesaid, in some way or manner, the crank shaft was turned, or by contact with the tin quart container or some other metal or conductor with which he was doing the work, electric sparks were thrown off, as might easily have been foreseen and known by the defendants, the gasoline was ignited by the electric spark, or current, and the plaintiff's car was thereby set on fire and totally destroyed, to the plaintiff's great damage.

There was evidence, as shown by the record, to sustain the allegation of negligence. The manner in which the work was done and the use of a large quantity of gasoline in and so near to the car, while it was being cleaned, where it was likely to be ignited from the wiring which was not disconnected during the performance of the work, clearly showed negligence. It was a dangerous undertaking at best, because the gasoline, and its vapors, especially, were highly inflammable, but it was a thing which could be done safely with the exercise of commensurate care, that is, ordinary prudence, and where this is true, the failure to exercise the proper care is ordinarily presumed (*Aycock v. R. R.*, 89 N. C., 321), in the sense, that it makes out a *prima facie* case of negligence, which means only that it carries the case to the jury, though the burden of showing negligence, or of establishing the issue in his favor, remains throughout the case with the plaintiff. *Cox v. R. R.*, 149 N. C., 117; *Page v. Mfg. Co.*, 180 N. C., 335; *Stewart v. Carpet Co.*, 138 N. C., 60; *Womble v. Grocery Co.*, 135 N. C., 474, and especially the recent case of *Sweeney v. Erving*, 228 U. S., 233, where the Court cites and approves the rule as stated by this Court in *Stewart v. Carpet Co., supra,* and says, with reference thereto, that *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking; but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they may make a case to be decided by the jury, not that they forestall the verdict. *Res ipsa loquitur,* where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff. Such, we think, is the view generally taken of the matter in well considered judicial opinions. These views are sustained by the recent case of *White v. Hines,* 182 N. C., 275, where the question was fully and learnedly examined with a copious citation of the authorities by *Justice Adams,* and the true rule clearly and finally formulated in accordance with what precedes. Under the rule we have above stated, and the authorities we have arrayed in support of it, we are of the opinion that there was some evidence of negligence in this case fit for the consideration of the jury, and that the very circumstances of the case and the manner and consequences of doing the work, as it was done, furnish some evidence that it was negligently performed.

The learned and just judge who presided at the trial did not mean by his instruction to the jury, to which a general exception was taken by the defendant, that it was for them to decide whether there was any evidence of negligence, and thereby submit a question of law to them. Such a construction of his words would be too narrow, and the entire charge shows clearly that he intended to refer to them the question only as to whether the evidence satisfied them that in fact there was negligence.

The learned counsel for defendant properly abandoned his second exception in deference to our decision in *Beck v. Wilkins,* 179 N. C., 231, which covers the main features of this case.

No error.

J. J. SANDERS v. ROCKY MOUNT INSURANCE AND REALTY COMPANY.

(Filed 22 February, 1922.)

Injunction—Issues of Fact—Mortgages.

Where the purpose of the action is to enjoin the sale of lands under a deed in trust or mortgage, and upon the hearing before the judge, upon the injunctive remedy sought, the affidavits are conflicting upon the question at issue as to whether the mortgage debt had been paid, the injunction should be continued to the hearing to ascertain the facts involved.

APPEAL by defendant from *Allen, J.,* at chambers, 20 December, 1921, from NASH.

W. M. Person for plaintiff.
Battle & Winslow for defendant.

WALKER, J. This action was brought to restrain and enjoin the defendant insurance company from selling certain real estate under the deed of trust described in the pleadings. The plaintiff alleged that all or a large part of the indebtedness secured by the said deed of trust had been settled and paid, and that a very small amount, if anything, remains due thereon.

There was much controversy between the parties upon the essential facts, alleged and denied. The motion for the injunction was heard by the judge upon affidavits, and as it appeared from them, and the pleadings, that important issues are raised upon the vital question of indebtedness, as to whether there is any now due, and if any, how much, the court continued the preliminary injunction to the final hearing, and the defendant appealed.

The correctness of this ruling cannot be questioned, and is fully sustained by the case of *Cobb v. Clegg*, 137 N. C., 153, where we held that it is generally proper, when the parties are at issue concerning the legal or equitable right, to grant an interlocutory injunction to preserve the right *in statu quo* until the determination of the controversy, and especially is this the rule when the principal relief sought is in itself an injunction, because a dissolution of a pending interlocutory injunction, or the refusal of one, upon application therefor in the first instance, will virtually decide the case upon its merits and deprive the plaintiff of all remedy or relief, even though he should be afterwards able to show ever so good a case. The Court there added that the principle thus stated is well supported by the authorities, citing numerous cases decided by this Court, as follows: 1 High on Injunctions (3 ed.), sec. 6; *Jarman v. Saunders*, 64 N. C., 367; *Heilig v. Stokes*, 63 N. C., 612; *Mfg. Co. v. McElwee*, 94 N. C., 425; *Purnell v. Daniel*, 43 N. C., 9; Bispham's Eq. (6 ed.), sec. 405; *Marshall v. Comrs.*, 89 N. C., 103; *Lowe v. Comrs.*, 70 N. C., 532; *Capehart v. Mhoon*, 45 N. C., 30, and *Troy v. Norment*, 55 N. C., 318, where *Nash, J.*, said: "In applications for special injunctions (and this is such a one) the bill is read as an affidavit to contradict the answer; and where they are in conflict, and the injury to the plaintiff will be irreparable if the relief be not granted, the injunction will not be dissolved on motion, but will be continued to the hearing to enable the parties to support by proofs their respective allegations. Justice demands this course. When there is nothing before the Court but oath against oath, how can the Chancellor's conscience be satisfactorily enlightened?" In *Marshall v. Comrs.*, 89 N. C., 103, the Court says: "The injunctive relief sought in this action is not merely auxiliary to the principal relief demanded, but it is the relief, and a perpetual injunction is demanded. To dissolve the injunction, therefore, would be practically to deny the relief sought and terminate the action. This the Court will never do where it may be that possibly the plaintiff is entitled to the relief demanded. In such cases it will not determine the matter upon a preliminary hearing upon the pleadings and *ex parte* affidavits; but it will preserve the matter intact until the action can be regularly heard upon its merits. Any other course would defeat the end to be attained by the action." In *Lowe v. Comrs., supra, Bynum, J.,* says that, in such cases, "much must depend upon the sound discretion of the court to whom the question of dissolving the injunction is referred." We believe that the judge in this case exercised this sound discretion correctly, if such was vested in him, and that he properly continued the injunction to the final hearing, so that the matters, now seriously controverted, may be settled in the manner provided by law.

The matter is so fully considered in *Cobb v. Clegg, supra,* and the cases therein cited, that further discussion is useless. The principle stated in *Cobb v. Clegg, supra,* has frequently been affirmed and the case cited with approval as late as 181 N. C., 179, in *Gray v. Warehouse Co.,* and was expressly applied in *Seip v. Wright,* 173 N. C., 14. In *Hyatt v. De Hart,* 140 N. C., 270, the *Chief Justice* thus broadly stated this rule as being applicable under our present procedure: "Ordinarily, the findings of fact by the judge below are conclusive on appeal. While this is not true as to injunction cases, in which we look into and review the evidence on appeal, still there is the presumption always that the judgment and proceedings below are correct, and the burden is upon the appellant to assign and show error; and looking into the affidavits in this case, we cannot say there was error below. The general rule is that when the injunctive relief sought is not merely ancillary to the principal relief demanded in the action, but is itself the main relief, the Court will not dissolve the injunction, but will continue it to the hearing." We are clearly of the opinion that there is sufficient controversy as to the facts to bring this case within this general rule, and there is, at least, some probability that the plaintiff will be able to sustain his allegations at the final hearing.

This being so, we must affirm the decision of the court below.

The motion of the plaintiff to dismiss the appeal is denied upon the facts stated by Judge Allen in the record.

Affirmed.

J. M. JENNINGS v. STATE HIGHWAY COMMISSION ET AL.

(Filed 22 February, 1922.)

1. Eminent Domain—Government—Private Property—Public Use—Compensation—Constitutional Law.

A government has, under the power and principles of eminent domain, the right to appropriate private property for a public use, on making due compensation therefor.

2. Same—State Agencies—Discretion—Statutes.

Where the statute authorizes the taking of private property for a public purpose, the necessity for the exercise of the power in a given case, and the extent of it, under all ordinary circumstances, is for the Legislature, either directly or through subordinate agencies designated for the purpose.

3. Same—Reasonableness and Necessity—Implied Powers.

When the Legislature has not defined the extent or limit of the appropriation of private property to be taken for a public use, the authorities charged with the duty are restricted to such property in kind and quantity as may be reasonable and necessary to the purpose designated.

4. Same—Questions of Law—Trials.

Where the statute does not definitely determine as to the kind and quantity of private property to be taken by its designated agencies for a public purpose, such kind and quantity may be so taken by them as may be reasonably necessary therefor; but when such agencies have acted in good faith and do not exceed a reasonable discretion with which it is vested, the courts will seldom, if ever, interfere.

5. Same—Notice to Owner—Time of Payment.

Where the statute authorizing designated agencies of the State to take private property for a public use otherwise provides, it is not necessary to notify the owner that his property is to be appropriated: *Provided*, he is to be notified and given opportunity to be heard in the proceedings on the question of compensation that may be due him.

6. Same—State Highway Commission—Roads and Highways.

Under the provisions of our statutes the State Highway Commission is given power to enter on and appropriate land of private owners, on giving notice, for the purpose of constructing highways as a part of the State system, C. S., 3667 *et seq.*, with the right to acquire material, gravel beds, etc., necessary for the construction and maintenance of such roads, conferring for the purpose the powers of eminent domain (C. S., 1715 *et seq.*), with an additional provision in enlargement of such powers, authorizing the commission to enter the lands, take possession of such timber and materials, and use them for the purpose required, prior to bringing condemnation proceedings, and without making a deposit, etc., in the event of the owner's appeal, or compensating the owner prior to the final determination of the action as to the amount: *Held*, the right of the commission to use the materials for the purposes stated being specifically given by statute, it is not required that the board first proceed by action before taking the necessary materials for the State highway construction or maintenance.

CIVIL ACTION, heard on return to preliminary restraining order before *Horton, J.*, holding courts of the First Judicial District, on 24 October, 1921.

The action is prosecuted by plaintiff, an owner of adjacent lands, to restrain defendants, the Highway Commission, from entering on said land and taking therefrom soil and material for purposes of constructing a public road, laid off as part of the State highway system, etc. On the affidavits and evidence submitted, the court finds the facts and entered judgment thereon as follows:

JUDGMENT DISSOLVING INJUNCTION

This cause coming on to be heard at Elizabeth City, N. C., before his Honor, J. Lloyd Horton, upon motion to show cause why the restraining order in this matter should not be continued to the hearing. After the hearing of the evidence, the complaint and answer being used as affidavits, and also upon the affidavits filed herein, the court finds as follows:

1. That the defendant State Highway Commission, through its duly authorized agents, has gone on the lands of the plaintiff and is cutting and removing soil therefrom for the purpose of constructing a part of the State highway system as provided in ch. 2, Public Laws 1921, and that there is clearly expressed statutory authority for the acts of the defendant State Highway Commission.

2. That the plaintiff's lands are used for farming purposes, and that no invasion has been made of the plaintiff's curtilage; that the defendant's entry thereon was reasonable and proper, and not an abuse of discretion or authority.

3. That the defendant State Highway Commission is engaged in a highly important public enterprise, to wit, the construction of public highways which are a public necessity. And that the material sought and taken from plaintiff's lands is necessary for the proper construction of a part of the State highway system as aforesaid, and that the material taken from the plaintiff's lands is being used by the commonwealth, or an agency thereof, for the public use and for the promotion of public welfare.

4. That the defendant State Highway Commission is willing, able, and ready to make proper and sufficient compensation, as it avers, at such time as the compensation can be fairly and justly determined, but that the measure of damages, if any, cannot be fairly and fully determined until the public highway is complete; that it cannot now be ascertained how much material may be necessary for the proper construction of the said public highway.

5. That ample provision is made for just and sufficient compensation to plaintiff by defendant State Highway Commission for all material or land to be used by it in the construction of the particular public highway.

6. That defendant "was not obliged to initiate proceedings. It was not obliged to know that plaintiff claims damages until he claims them in the mode provided."

It is therefore, on motion of Walter L. Cohoon, counsel for defendant, ordered and adjudged that the restraining order heretofore granted in this cause be and the same is hereby dissolved.

Plaintiff excepted, and appealed.

Aydlett & Simpson for plaintiff.

Attorney-General Manning and Assistant Attorney-General Nash for the State Highway Commission.

HOKE, J. Plaintiff excepts to the judgment, contending, as we understand his position, that the right to take and use his property can only be acquired by action or special proceedings duly instituted, and in which the kind and quantity of material to be taken shall be designated and fully described, but in our opinion the exception cannot be sustained.

The General Assembly has conferred on the Highway Commission the power to enter on and appropriate land of private owners for the purpose of constructing highways as part of the State system, on giving due notice to the owner. C. S., 3667 *et seq.* And in chapter 2, section 22, they have also given defendant board the right to acquire material, gravel beds, sand bars, rocks, or other soil, mineral deposits, etc., necessary and suitable for the construction and maintenance of such roads, where such beds, quarries, etc., are not presently open and operated *bona fide* by private enterprise, conferring upon defendant for the purpose indicated the powers of eminent domain, contained in C. S., 1715 *et seq.,* and with the additional provision in enlargement and extent of such powers as follows: "In case condemnation proceedings shall become necessary, the State Highway Commission is authorized to enter the lands and take possession of same, and also take possession of such materials and timber as is required by it *prior* to bringing the proceedings for condemnation, and prior to the payment of the money for said property." And further: "In the event that the owner or owners shall appeal from the report of the commissioner (of assessment, etc.), it shall not be necessary for the State Highway Commission to deposit the money assessed with the clerk, but it may proceed and use the property to be condemned until the final determination of the action."

It is universally conceded that a government has, under the power and principles of eminent domain, the right to appropriate private property for a public use, on making due compensation therefor; that where the use is for a public purpose the necessity for the exercise of the power in a given case and the extent of it, under all ordinary circumstances is for the Legislature, either directly or through subordinate agencies designated for the purpose. And the well considered cases on the subject hold that when the Legislature has not defined the extent or limit of the appropriation, the authorities charged with the duty are restricted to such property in kind and quantity as may be reasonably suitable and necessary to the purpose designated. *Dickson v. Perkins,* 172 N. C., 359; *Jeffress v. Greenville,* 154 N. C., 490; *S. v. Jones,* 139 N. C., 613; *Lynch v. Forbes,* 161 Mass., 302; 1st Elliott on Roads and Streets (3 ed.), secs. 250-256; 15 Cyc., 632.

In the citation to Elliott, sec. 256, the author says: "As we shall show in the following sections, the general rule, where the statute does not definitely determine the question, is that so much, and so much only, as is reasonably necessary may be taken, but where a municipality acts in good faith and does not exceed the amount of a reasonable discretion, with which it is invested, the courts will seldom if ever interfere."

And these and other authorities are to the effect further that unless the statute appertaining to the subject otherwise provides, it is not necessary to notify the owner that his property is to be appropriated, provided he is notified and given opportunity to appear and be heard on the question of the compensation that may be due him. *S. v. Jones, supra; Kinston v. Loftin,* 149 N. C., 255; 15 Cyc., 632.

In the case before us it appears from a perusal of the record that the Legislature has expressly conferred the power on defendant board to enter on plaintiff's property and appropriate the material in question. On satisfactory proof the Court finds that such material is suitable and reasonably required for the public purposes designated, and under the provisions of the statute are a proper application of the principles referred to, we must approve the rulings of the court and affirm the judgment dissolving the injunction.

Affirmed.

MRS. BINA ARPS ET AL. v. J. L. DAVENPORT ET AL.

(Filed 1 March, 1922.)

Contracts—Options—Verbal Agreements—Lands—Statute of Frauds—Pleadings—Admissions.

A verbal option of lands will not be declared void by the courts, as a matter of law, under the statute of frauds requiring a writing, when the party to be charged admits the alleged contract, in accordance with its stated terms, and resists performance upon entirely separate and distinct matters.

APPEAL by plaintiffs from *Allen, J.,* at October Term, 1921, of WASHINGTON.

Civil action to recover damages for an alleged breach of contract.

On 4 November, 1919, the plaintiffs, Mrs. Bina Arps and husband, J. M. Arps, executed and delivered to the defendants a paper-writing whereby the said defendants were given the right, privilege, and option to purchase the "Arps farm" of 200 acres or more, situate in Plymouth Township, Washington County, at and for a stipulated price and upon the terms therein set out, but it was understood and agreed that the said option should be exercised on or before 10 December, 1919.

The defendants gave the plaintiffs due and timely notice of their intention to exercise the option and paid a part of the purchase price, but failed to execute the notes and mortgage, as provided in the contract of sale, and now refuse to comply with their agreement upon the ground that there is a shortage of approximately 52 acres in the land contracted to be sold.

At the close of plaintiffs' evidence there was a judgment as of nonsuit upon the theory that as the contract was in the nature of an option, and defendants did not accept same in writing, the plaintiffs were remediless under the statute of frauds. Plaintiffs appealed.

W. L. Whitley for plaintiffs.
Ward & Grimes for defendants.

Stacy, J. Considering the facts, as above stated, and in view of the pleadings filed herein, we think the judgment of nonsuit was erroneously entered. The statute of frauds is not pleaded, and there is no denial of the contract; on the other hand, it is expressly admitted. Section (C) of the further answer reads: "That the defendants at all times stood ready, able, and willing to pay to the plaintiffs the amount due under the option at the time the same came due, deducting for the deficiency in acreage above set out, and now offer to accept and receive the land and pay for same, less the sum of $30 per acre for the 52 acres, which represent the actual deficiency in the acreage as aforesaid."

Under authority of *Henry v. Hilliard,* 155 N. C., 372, and cases there cited, the present judgment, which forms the basis of plaintiffs' appeal, must be set aside and the cause remanded for further proceedings. See, also, *Herndon v. R. R.,* 161 N. C., 650.

Reversed.

MATTHEW T. LAMM v. ATLANTIC COAST LINE RAILROAD COMPANY ET AL.

(Filed 1 March, 1922.)

Railroads—Negligence—Evidence—Nonsuit—Statutes—Comparative Negligence.

In an action to recover damages of a railroad company for negligent injury caused to its employee, there was evidence tending to show that plaintiff, while performing his duty as a switchman, coupled a car attached to defendant's locomotive, while not in motion, and the injury was caused by the sudden movement of the locomotive by the engineer, without a signal from the plaintiff, contrary to custom or practice, and crushed the plaintiff's foot between the bumpers on the cars, causing the injury complained of: *Held*, though there was evidence of contributory negligence, its establishment would not be a complete defense, under the provisions of our recent statute, C. S., 3467, applying the principle of comparative negligence in such cases; and upon a motion to nonsuit, evidence that the engineer properly acted on the signal of another employee will not be considered.

APPEAL by defendant from *Allen, J.*, at the October Term, 1921, of NASH.

The action is by plaintiff, an employee of defendant company, in charge and control of codefendant, the Director General of Railroads, to recover damages for serious and permanent physical injuries caused by the alleged negligence of defendants in the operation of a switching engine, in connection with which plaintiff, as employee and in the line of his duty, was presently engaged in coupling cars on a spur track of defendant railroad, running into the yards of Hackney Brothers. There was denial of liability and plea of contributory negligence, and on issues submitted as to liability of Director General, the jury render a verdict:

1. That the injury was caused by the negligence of defendant.
2. That plaintiff was guilty of contributory negligence.
3. Assessing plaintiff proportionate damages.

Judgment on the verdict for plaintiff and defendant, the Director General appealed, assigning for error chiefly the refusal of his motion to nonsuit.

E. B. Grantham and J. S. Manning for plaintiff.
F. S. Spruill for defendant.

HOKE, J. There were facts in evidence on part of plaintiff tending to show that on or about 28 July, 1918, plaintiff, a switchman in employment of defendant company, with others of the switching crew and a switching engine of defendant company were engaged in coupling some cars on a spur track of the company, running into the yards of Hackney Brothers; that the engine was being operated at the time by one A. L. Darden, an engineer also in employ of defendant, and as said engine was backed against the first of the cars, plaintiff, by direction of the yard conductor, and in the line of his duty made the coupling, and while the engine was standing still, plaintiff endeavored to pass between the engine and the car, by getting over the drawhead, and swung himself up for the purpose, when the engine, without further signal, was suddenly moved towards the car, causing plaintiff to fall, and whereby plaintiff's foot was caught between the bumpers and crushed, causing the injuries as stated; that by custom and practice, after the coupling was made, the switchman was to give a signal to this effect, and the engineer moved the engine further as per signal, and on this occasion plaintiff had given no signal for the engine to move, and at the time was endeavoring to pass between the engine and the car, partly to avoid being struck and rolled up by a brick wall very near the track, and also to be in a position to properly signal the engineer for some further couplings then to be made.

There was testimony on part of defendant tending to show that the engineer had moved his engine towards the car at the time, in response to a proper signal from another switchman, and that he was free from blame in the matter, but this may not be considered on a motion to nonsuit, and accepting the testimony of plaintiff as true, the established position on a motion of this character, it clearly permits if it does not require the inference that plaintiff was injured as the proximate result of defendant's negligence. It was earnestly urged for defendant that judgment of nonsuit should have been allowed because the negligence of plaintiff was clearly the proximate cause of the injuries received by him, citing and commenting chiefly on *Dermid v. R. R.*, 148 N. C., 180. But the position is not now available in support of a motion to nonsuit, by reason of the statute applicable, C. S., 3467, and which provides in part "that in all actions hereafter brought against any common carrier by railroad to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to the employee," etc.

This statute, enacted at the session of 1913, is controlling on the facts of the present record, and by its express provisions, contributory negligence on the part of the employee, though established, as it was in this instance, no longer bars a recovery, but is to be considered only on the question of damages, an effect that was no doubt properly allowed it on the trial, as no exception appears to the determination of that issue.

The authority chiefly commented by counsel, *Dermid v. R. R., supra,* was a case decided before the enactment of the statute referred to, and at a time when contributory negligence in this jurisdiction, where same was established, constituted a complete defense. We find no error in the record, and the judgment for plaintiff is affirmed.

No error.

T. S. McDEARMAN v. L. C. MORRIS.

(Filed 1 March, 1922.)

1. **Contracts—Custom.**

   A usage or custom to be taken as a part of a contract entered into by the parties, when not excluded by its express terms, must be reasonable, but, when fully established, its reasonableness will not be questioned, and the parties will be considered as having agreed to it, and it becomes binding on them as a part of their contract.

2. **Same — Instructions — Warehouseman — Bailment—Rule of Prudent Man—Appeal and Error—New Trials.**

   Where there is evidence of an established custom among warehousemen for the sale of leaf tobacco and the buyers on the warehouse floor, that the former insure the tobacco sold for the benefit of the latter until the buyers should have had a reasonable time in which to remove it, and this is the only question at issue, under conflicting evidence, an instruction which confuses this issue with the obligation of the rule of the prudent man, under the circumstances, or the duty of the warehousemen as bailees, is substantial error to the prejudice of the warehousemen, upon which a new trial will be ordered on appeal.

APPEAL by plaintiff from *Calvert, J.*, at second May Term, 1921, of NASH.

Civil action to recover the sum of $636.23, due by contract, and evidenced by three checks given to the plaintiff by the defendant. The amount and correctness of the plaintiff's claim was not denied; but the defendant set up, by way of further defense, a counterclaim in the sum of $513.73 for tobacco sold to the plaintiff, and which was destroyed by fire while on the warehouse floors of the defendant. Plaintiff denied liability upon the ground that although the tobacco had been bid off by him at the sale about two hours prior to the fire, yet it had not been actually delivered or removed, and according to the general custom of the trade then and there prevailing, it was the duty of the defendant to keep such tobacco insured for the benefit of the buyers until they had had a reasonable time within which to remove the same. The defendant carried a policy of insurance covering the "loose leaf tobacco on the floor and empty hogsheads owned or held by the assured, in trust, or on commission, or on joint account with others, or sold but not delivered," but contended that the tobacco in question was not included in its terms, and denied the existence of any such alleged custom or its applicability to the defendant's warehouse in Spring Hope. It was further contended by the defendant that the tobacco had been placed in baskets by the plaintiff's agents, and at the time of the fire was only awaiting the arrival of a truck to be carried away. There was also evidence tending to show a local or special custom prevailing on this particular market which was at variance with the general or established custom throughout the tobacco belt, as alleged by plaintiff.

Upon the issues thus joined, there was a verdict on the counterclaim in favor of the defendant. Whereupon his Honor rendered judgment for the difference between the respective amounts, and from said judgment the plaintiff appealed, assigning errors.

Battle & Winslow and Joseph B. Ramsey for plaintiff.
F. S. Spruill for defendant.

STACY, J., after stating the facts as above: The only questions presented for our consideration on this appeal are those relating to the defendant's alleged liability for failure to carry insurance for the benefit and protection of the plaintiff while the tobacco, which he had purchased, was still on the warehouse floors of the defendant; it being alleged that such was the general usage and custom under the instant facts and circumstances. The defendant denied the existence of any such usage or custom, and contended that, regardless of the general rule throughout the tobacco belt, no such understanding prevailed in the Spring Hope market.

Much of the argument before us was devoted to the question as to whether, as a matter of law, title to the tobacco was in the plaintiff at the time of the fire; and further, as to whether the same had been delivered in the meaning of the clause in the defendant's insurance policy, "sold but not delivered." Conceding that the legal title had passed to the plaintiff, we apprehend as to whether the tobacco had been *delivered and removed,* as contemplated by the custom or usage, if any, prevailing in said market, is a question of fact to be ascertained and determined by the jury under proper instructions from the court. 17 C. J., 525. What was the custom or usage, if any, obtaining here, which is presumed to have entered into and become a part of the agreement, or with reference to which the parties are presumed to have contracted? This is a question of fact, and it is not admitted. The jury alone may answer it. 17 C. J., 481.

His Honor, in the beginning of his charge, instructed the jury that the defendant's liability should be tested by the rule of the prudent man, under the instant facts and circumstances, or that he should be held to the duty of a bailee (*Hanes v. Shapiro,* 168 N. C., 24); and in a subsequent portion of his charge there was an instruction which seems to have placed the question of liability upon the existence or nonexistence of a general rule or custom prevailing in said market in regard to the warehouseman carrying insurance for the benefit of the buyers until a reasonable time had elapsed within which they might remove their tobacco from the warehouse floors. These instructions, placed as they were in opposition to each other, we think, were calculated to mislead, and in all probability did mislead, the jury. *S. v. Faulkner,* 182 N. C., 793. The rights and duties of the parties are contractual in their nature, and the usage or custom, if any, prevailing at the time and place in question is to be considered as a part of the contract, rounding it out and completing its terms. *Oil Co. v. Burney,* 174 N. C., 382. This is the ground upon which the plaintiff staked his defense to the counterclaim, as set up by the defendant. Therefore, what the contract was in its entirety and as to whether the defendant had discharged or breached his contractual obligations were questions to be measured by the terms of the agreement itself, and not necessarily by the conduct of the defendant as tested by the rule of the prudent man, or the duty of a bailee. It is true the custom or usage, which may be held to enter into and form a part of the contract, must be reasonable, as this is one of the essential requisites of its validity; but once fully established, nothing else appearing, it becomes obligatory and binding on the parties. *Penland v. Ingle,* 138 N. C., 456; 17 C. J., 449 *et seq.*

Where there is a well known usage or custom which obtains in a given trade or business, it is presumed that all who are engaged in said trade or business where it prevails contract with a view to such usage or custom, unless the presumption is excluded by agreement of the parties. *Hazard v. New England Marine Ins. Co.,* 8 Pet., 557; 27 R. C. L., 162, and cases cited in note.

For the error, as indicated, we think there should be a new trial; and it is so ordered.

New trial.

F. E. ENGSTRUM ET AL. v. UNION GAS ENGINE COMPANY ET AL.

(Filed 1 March, 1922.)

1. Injunction— Corporations—Nonresidents—Undertakings—Contracts—Parties.

Where, in an action against a contractor and subcontractor, it is admitted that the latter is a nonresident corporation, and is about to remove the remainder of its property from the State, and it is alleged that it owes the plaintiff in a certain sum, and it appears that the contractor has admitted service of summons and entered an appearance, and owes its codefendant money in a sum little more than the amount in suit, an order restraining the defendant contractor from paying over to its codefendant subcontractor, the moneys due it under the subcontract, is properly granted; and a provision in the order that the restraining order should automatically cease upon the subcontractor giving a bond in a certain sum in lieu thereof, and that the plaintiff also give bond to assure the defendants' costs and expenses was properly entered under the circumstances.

2. Injunction—Issues—Fraud—Trials.

Where the plaintiff has sufficiently shown that he is entitled to the injunctive relief sought in the action, all collateral matters as to fraud, etc., are properly continued to be determined with the other issuable matters of fact at the trial.

APPEAL by defendants from *Bond, J.,* at chambers in New Bern, 5 October, 1920, from CRAVEN.

This is an action by the plaintiffs, trading as the Newport Shipbuilding Company, to restrain the defendants, the Newport Shipbuilding Corporation, from paying to its codefendant, the Union Gas Engine Company, certain moneys. The plaintiffs allege in the complaint that the Union Gas Engine Company is indebted to them in the sum of $53,004.32, and that said engine company is a foreign corporation, resident in the State of California, and without assets in North Carolina, excepting the balance due to it by the Newport Shipbuilding Corporation under a contract with the U. S. Government set out in the record, on the terms of which there was due over $600,000. Under this contract the plaintiffs allege the Newport Shipbuilding Corporation has paid to its codefendant, the engine company, all the balance due, excepting about $60,000, and the contract is nearing completion when the remaining balance will soon be due to the engine company, which will remove the same from this State, and the plaintiffs could find no assets from which they could maintain a recovery, which they are entitled to have against the engine company. The complaint alleges that the Union Gas Engine Company has already been paid $549,000, and under the cause of action alleged in the complaint, the plaintiffs are entitled to recover from them

$53,004.32, and the defendant, the Union Gas Engine Company, would have no property in the State after the completion of such work from which the plaintiffs could recover the sum found due. The indebtedness of the gas engine company to the plaintiff is based upon a contract made by the Newport Shipbuilding Corporation and the plaintiff, the Newport Shipbuilding Company, for the construction of certain concrete vessels for the Government at New Bern, and the Union Gas Engine Company was a subcontractor for the furnishing of the gas engines and certain other equipment specified in the contract for said vessels. It is admitted that the gas engine company is a foreign corporation, and that it has no assets in this State sufficient to pay the judgment, if any, due the plaintiff should the plaintiff recover.

The plaintiff further alleges that the defendant Newport Shipbuilding Corporation had a contract with the U. S. Government for the construction of seven vessels, and the plaintiff partnership, trading under the name of the Newport Shipbuilding Company, subcontracted with it for the construction of the hulls and for certain other work on these vessels saving the gas engines and equipment to be furnished by the defendant gas engine company, the contract with which is set out in the record. Under the terms of this contract over $200,000 was required to be paid to the gas engine company before they started work on the construction of the engines required to be furnished by it, and in order to secure these advances the contract was sent to the War Department at Washington. The contract, which it is now attacking, its representatives before the War Department presented as the true contract between the parties to secure the advancement from the Government for the gas engines.

Upon the complaint and affidavits in this action, a temporary restraining order was issued by Guion, J., 17 June, 1920, returnable 16 August, 1920, and thereafter the restraining order was continued by consent from time to time until the October term of Craven, when, upon the hearing of the motion, Bond, J., continued the restraining order against the Union Gas Engine Company upon the plaintiff giving bond in the sum of $10,000, which was filed.

His Honor provided in the order that upon the giving of security at any time by the Union Gas Engine Company in the sum of $60,000 to secure the payment to the plaintiff of such sum as might be finally adjudged to be due the plaintiff, the injunction should stand dismissed without further order. There has been at no time any restraint against the shipbuilding corporation, and if the Union Gas Engine Company should desire to receive the money, which may become due, it can do so upon executing the bond prescribed by the judge. It is suggested that the codefendant, the Newport Shipbuilding Corporation, was not served with summons, but the record shows that it had admitted service and entered its appearance in this action. From the order continuing the restraining order to the hearing upon execution by plaintiff of the bond above stated, the defendant Union Gas Engine Company appealed.

Moore & Dunn for plaintiffs.
Ward & Ward and T. M. Fields for defendant.

CLARK, C. J. The defendants admit that both the defendants, the Newport Shipbuilding Corporation and the Union Gas Engine Company, are nonresidents having been incorporated in California, and that the Gas Engine Company is without property in the State; and further, that the Newport Shipbuilding Company is indebted to the Gas Engine Company in the sum of $60,000 or more.

It is true that the defendant engine company alleges that the action by the plaintiff is collusive and in the interest of the shipbuilding corporation. It admits that its codefendant is indebted to it in the sum of $60,000 or more, of which it is demanding payment, but avers that that corporation has several hundred thousand dollars worth of tangible personal property in the city of New Bern; that it is abundantly solvent and able to pay any judgment recovered against it by the plaintiff, and avers that the plaintiffs, stockholders, are the chief stockholders and practically sole owners of its codefendant, the Newport Shipbuilding Corporation, and are its directors and general officers, and that the pretense that they are different and have different and separate control is fictitious and fraudulent; that this suit is brought by collusion for the fraudulent purpose of preventing the codefendant from paying the amount due under the contract, and also to give the said codefendant colorable standing as a basis to deal with the Government in this and other contracts, and the plaintiffs are insolvent.

The allegations of fact in the complaint, and in denial, are matters which must be determined upon the evidence in the trial of the issues arising thereon. It is admitted that the defendant gas engine company is a nonresident corporation, with no property in this State. If the allegations of the plaintiff are found to be true, it would be without remedy, unless by injunction or attachment the plaintiff is able to restrain the collection by the engine company of the sum it claims against its codefendant, the shipbuilding corporation.

In *Ellett v. Newman,* 92 N. C., 519, *Merrimon, J.,* held that, "Where there is reason to apprehend that the subject of the controversy will be destroyed or removed, or otherwise disposed of by the defendants pending the action, so that the plaintiff may lose the fruit of his recovery, the court will take control of it by the appointment of a receiver or the granting of an injunction, or by both, if necessary, until the action shall be tried on its merits." It is true that in this case there is no direct controversy as to the subject-matter, but upon the granting of the injunction by the judge we must take it that he found, and there are affidavits to support his finding, that both defendants being nonresident corporations, and the gas engine company being without other assets in this State, if the $60,000 due to it by its codefendant, the shipbuilding company, was paid to it and removed from the State it could not then be attached or applied to the indebtedness due by it to the plaintiff, and therefore, in order to preserve such liability to any judgment that the plaintiff may recover of it, the gas engine company was required to give bond that such indebtedness may be forthcoming for application to any judgment which the plaintiff might recover, and in default of such bond is enjoined from collecting and removing such until its indebtedness to the plaintiff is determined by judgment.

The contract and dealings between the Union Gas Engine Company and its codefendant, being about concluded and all the payments thereunder having been made except the small balance, $60,000, which is little more than sufficient to pay the claim of the plaintiff, if the gas engine company were allowed to complete its contract and remove its manager and officers from this State, which the plaintiff alleges it is about to do, the plaintiff would have no method of securing service of process upon it, as both the defendants are California corporations.

The plaintiff could not acquire jurisdiction within the State of North Carolina except by the service of process issued and served before the managers had opportunity to leave the State, and it is alleged that when the service of summons was made upon the gas engine company, the officer upon whom it was served was preparing to leave, and had already removed all of its property, and but for this proceeding the plaintiff would have had no redress, since it could not have attached the indebtedness due to the defendant gas engine company by its codefendant after such payment and removal.

The order of the court allowing the gas engine company to execute bond to secure any judgment obtained against the shipbuilding corporation enables the gas engine company, without any inconvenience, to proceed with its business and to collect what was due to it, and the $10,000 bond required to be filed by the plaintiff protects the gas engine company from damages if there is any in restraining collection in excess of the sum which may be found to be due by it to the plaintiff.

Under these circumstances the injunction was properly continued to the hearing when all these matters of fact can be fully determined.

Affirmed.

BIRDIE S. CURRY, INDIVIDUALLY AND AS ADMINISTRATRIX OF J. FRANK CURRY, DECEASED, v. MARY JOE CURRY ET AL. AND W. Z. GREER, GUARDIAN AD LITEM OF INFANT DEFENDANTS.

(Filed 1 March, 1922.)

1. **Estates—Heirs—Rule in Shelley's Case.**

A devise of an estate to each of the testator's children "as long as they may live and after their death to their heirs," passes to each a fee-simple interest under the rule in *Shelley's case. Wallace v. Wallace*, 181 N. C., 158, cited and applied; *Mills v. Thorne*, 95 N. C., 332, distinguished.

2. **Dower — Executors and Administrators — Lands — Sales — Assets — Creditors.**

Upon the petition of the widow, as executrix and individually, to have the lands of her deceased husband sold to pay his debts, and for the allotment of her dower therein, the widow is entitled to her dower in the lands, and, subject thereto, the lands should be sold under the statute to make assets to pay the debts of the deceased, it appearing that the personal property is inadequate.

APPEAL by defendants from *Bryson, J.*, at the January Special Term, 1922, of DAVIDSON.

Petition for dower, and to sell land to make assets, heard on appeal from the clerk of the Superior Court of Davidson County. There was judgment confirming the judgment of the clerk in favor of the petitioner, and defendants excepted and appealed.

Raper & Raper for plaintiff.
P. V. Critcher for defendants.

HOKE, J. It appears from a perusal of the pleadings and the admission of the parties that J. Frank Curry died on .... December, 1921, intestate, owning a lot of realty, and indebted to an amount largely in excess of his personal property, leaving him surviving the petitioner, his widow, and three infant children as his heirs at law; that plaintiff having duly qualified as administratrix, filed this her petition, praying for an allotment of dower in all the lands of which the deceased was seized and possessed, and also to sell such portion of the remainder of the real property as was required to pay the debts; that defendants are the infant children of the deceased, represented by a duly appointed guardian *ad litem*. There was judgment by the clerk awarding the petitioner dower in all the lands owned by the deceased except one lot in which he had a remainder after a life estate, and that the residue excepting the dower interest, or so much thereof as was necessary, be sold for payment of indebtedness. This judgment was in all respects confirmed by his Honor, and we find no valid objection that can be urged against the judgment or the proceedings in which the same has been entered. The only exception insisted on by appellants is that certain portions of the realty devised by the will of his father, W. F. Curry, deceased, conveyed to the intestate only a life estate in the property.

From the facts in evidence it appears that the title to the realty referred to and the nature and extent of the intestate's ownership is dependent upon the following clause in his father's will in terms as follows: "I will and bequeath to each of my children an equal share in my real estate, to have and to hold as long as they may live, and after their death to their heirs." And this, in our opinion, under the rule in *Shelley's case,* clearly passed to the intestate a fee-simple interest in his portion of the property, which has been duly allotted to him on partition of the father's realty. *Wallace v. Wallace,* 181 N. C., 158; *Nobles v. Nobles,* 177 N. C., 243; *Robeson v. Moore,* 168 N. C., 389; *Price v. Griffin,* 150 N. C., 523.

The prevalence of the rule in this State and its pertinency to the facts of the present record, as well as a recognized instance where the rule does not apply, are set forth in the recent case of *Wallace v. Wallace,* as follows, where it was held in part:

"1. A limitation coming within the rule in *Shelley's case,* recognized as existent in this State, operates as a rule of property, passing, when applicable, a fee simple, both in deeds and wills, regardless of a contrary intent on the part of the testator or grantor appearing in the instrument.

"2. Whenever an ancestor by any gift or conveyance took an estate or freehold, as an estate for life, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs or to the heirs of his body as a class to take in succession as heirs to him, such words are words of limitation of the estate, and conveys the inheritance, the whole property to the ancestor, and they are not words of purchase.

"3. In order to an application of the rule in *Shelley's case,* the words 'heirs' or 'heirs of the body' must be taken in their technical sense, or carry the estate to the entire line of heirs to hold as inheritors under our canons of descent; but should these words be used as only designating certain persons, or confining the inheritance to a restricted class of heirs, the rule does not apply, and the ancestor or the first taker acquires only a life estate according to the meaning of the express words of the instrument."

We were referred by counsel for appellants to the case of *Mills v. Thorne,* 95 N. C., 362-364, citing with approval *Ward v. Jones,* 40 N. C., 400, as authority against application of the rule in the present case, but we do not so understand those decisions.

In the *Mills case,* as well as that of *Ward v. Jones, supra,* it was held that annexing the words "to be equally divided between them" to the terms "heirs" or "issue" in the ultimate limitation after a preceding life estate, would prevent the operation of the rule in *Shelley's case.* This, as stated in the opinions, was because the use of such qualifying words would change these terms from their hereditable significance and quality under our general canons of descent so as to require a per capita division among the "heirs or issue." As the estate might therefore be carried to a different line of heirs from those who would take by our general canons of descent under the third position, as taken from the *Wallace decision, supra,* and the rule in *Shelley's case* would not apply and the heirs or issue referred to in ultimate limitation would take and hold as purchasers.

But not so here, where there are no qualifying words annexed to the ultimate limitation, but under the father's will, the estate is in effect devised to the children "in equal portions for life with remainder to their heirs," without more. Both under the first and the ulterior limitation the property is passed in the same interest and in the same manner as the law of descents would have given it, and in our opinion as stated the rule in *Shelley's case* clearly applies.

This being true, the widow of this owner is entitled to her dower, and subject to such interest the creditors or plaintiff, as their representative, is entitled to a sale to make assets as the lower courts have decreed. We find no error in the record, and the judgment is affirmed.

Affirmed.

JOHN L. ROPER LUMBER COMPANY v. ANNIE W. HERRINGTON ET AL.

(Filed 1 March, 1922.)

1. **Deeds and Conveyances—Interpretation—Intent—Technical Rules.**

   That the intention of the parties, particularly of the grantor, must control is the cardinal rule in the construction of deeds.

2. **Same—Remainder—Children in Esse.**

   A remainder to a class of children, or more remote relatives, vests in right, but not in amount, in such of the objects of the bounty as are *in esse* and answer the description, subject to open and let in any that may afterwards be born before the determination of the particular estate; and a sale may generally be authorized by the court where, in case of a remainder to a class, those of the class who are *in esse* represent the others. In such case it is assumed that those who represent a particular class will protect the interest of all who have or may acquire an interest in the remainder.

3. Actions—After-born Children—Contingent Interest—Class Representation.

W. executed a deed, reciting in the *habendum* a conveyance to A. and M. for life, and at their death to their children, reserving a life estate. Following the description was a provision that A. should have the eastern part during her natural life, and at her death the land should go to her children, and that M. should have the western part for life and at her death to her children, if any, but if she should die leaving no children, then to A. for life and at her death to her children. A. was married and had children; M. was not married. In 1904 M. was the mother of two children. A special proceeding was begun by M. and her two children to sell the land. The sale was made and confirmed in 1904. In 1908 two other children were born to M., and they now claim an interest in the land: *Held*, they cannot recover, on the ground that a remainder to a class vests in right, but not in amount in such of the objects of the bounty as are *in esse* and answer the description, and in this proceeding the children *in esse* represented those born afterward.

APPEAL by plaintiff from *Ferguson, J.*, at November Special Term, 1921, of WASHINGTON.

In 1882, H. J. Williams and wife executed a deed reciting in the premises and in the *habendum* a conveyance to Annie W. Herrington and Mary E. Lewis for their natural life, "and at their death, then to their children, reserving a life estate in said land for H. P. Lewis and his wife, Ella E. Lewis," the parents of Annie W. Herrington and Mary Lewis. Following the description of the land is a provision that Annie W. Herrington should have and possess the eastern part of the land conveyed during her natural life, and at her death it should go to her children; and that Mary Lewis should have and possess the western part during her natural life, and at her death to her children, if she should have any, but if she should die leaving no children, then to Annie W. Herrington during her natural life, and at her death to her children. About 1896 this land was accordingly divided by Annie W. Herrington and Mary E. Lewis, and such division is recognized by the parties to this suit. The land described in the petition is the part which was allotted to Mary E. Lewis.

At the time the deed of H. J. Williams and wife was executed, Annie W. Herrington was married and had children; Mary Lewis was not married. In 1895, Mary Lewis married W. P. Knowles, and in 1904 was the mother of two children, Ruth and Annie Knowles. These were the only two children born to Mary Lewis prior to 1908.

In 1904 a special proceeding was begun by W. P. Knowles, his wife (Mary Lewis), and Ruth Knowles and Annie Knowles, by their general guardian, for the purpose of selling the land, and an order was made by the clerk appointing a commissioner to make sale. This order was afterward approved by the judge. The sale was duly confirmed, the commissioner made a deed to the purchaser, and the purchaser, on 4 November, 1904, made a deed to the plaintiff. In 1908 a third child, William, and in 1912 a fourth, Robert, were born to Mary Lewis Knowles.

The petitioner instituted a proceeding to register its title under the Torrens law. Robert Knowles and William Knowles, children born after the sale was made by order of court, filed an answer and denied petitioner's title. They assert that under the deed from H. J. Williams to Mary Lewis they take an interest in the lands claimed by the petitioner, and that the special proceeding under which the lands were sold in 1904 did not have the effect of divesting their interest in the land.

The contention of the defendants is that the children of Mary Lewis took a contingent remainder under the deed from H. J. Williams, and that the court could not sell their contingent interest, and that the purchaser at said sale did not acquire their interest. The proceeds derived from said sale are in the hands of W. P. Knowles, the father of the defendants, who asserts that he is holding the proceeds for the benefit of the two children who were in being at the time the land was sold under order of court.

The examiner of titles made report, to which the petitioner filed exceptions. In the Superior Court the following issues were drafted:

"1. Is the petitioner the owner of the land described in the petition? Answer: 'Yes. The petitioner owns the interest of W. P. Knowles, Mary E. Knowles, Ruth Knowles, Annie Knowles, and E. L. Herrington and Annie W. Herrington, but is not the owner of the interest of William and Robert Knowles, and which they took under the deed from H. J. Williams, Book Y, page 35, nor of such children as may be hereafter born to Mary E. (Lewis) Knowles.'

"2. Were L. G. Roper, guardian, and S. B. Spruill, attorney, properly authorized to represent the minors and to execute the deed, as alleged? Answer: 'Yes.'"

After the jury had answered the second issue, the court answered the first as a matter of law.

His Honor rendered judgment that the petitioner is the owner of such interest in the land as was conveyed to Annie W. Herrington and Mary E. Lewis, and of such interest as Annie Knowles and Ruth Knowles acquired under the Williams deed; but that the petitioner does not own, and the commissioner's deed does not convey, the interest of William Knowles and Robert Knowles, who were born after the institution of the special proceeding, or the interest of any child that may be born hereafter to Mary Lewis Knowles.

Small, MacLean, Bragaw & Rodman for plaintiff.

ADAMS, J. His Honor held as a conclusion of law that the commissioner's deed did not convey to the purchaser the interest of William Knowles and Robert Knowles, or the interest of any child that might thereafter be born to Mary Lewis Knowles, and directed a qualified affirmative answer to the first issue. The exceptions call in question the correctness of this ruling and of the judgment rendered on the verdict. The judgment was determined chiefly by the answer to the first issue; and the answer to the first issue was no doubt determined by his Honor's interpretation of the Williams deed.

In the granting clause this deed purports to make conveyance to Annie W. Herrington and Mary E. Lewis during their natural life, and at their death to their children, reserving for H. P. Lewis and his wife a life estate. The *habendum* is substantially identical. When the deed was executed Mary Lewis was unmarried and had no children; and while as to unborn members of a class the remainder is contingent until they are *in esse,* when they come in being the remainder immediately vests. The remainder to the children of Mary Lewis, after her life estate, therefore vested immediately upon the birth of the oldest child. Here the direct question is whether the vested remainder given the children is defeated by the clause which follows the description. That the intention of the parties—particularly the intention of the grantor—must govern, is the cardinal rule in the construction of deeds; and such intention, drawn from the entire instrument, when once ascertained, will prevail over technical rules of construction. The obvious intention of the grantor was to convey an estate of equal dignity to Annie W. Herrington and Mary E. Lewis for life, with remainder in fee to the children of each; and if no children should be born to Mary E. Lewis, the remainder at the expiration of her life estate should go to Annie W. Herrington during the latter's natural life, and at her death to her children.

In these circumstances the accepted doctrine is that a remainder to a class of children, or more remote relatives, vests in right, but not in amount, in such of the objects of the bounty as are *in esse* and answer the description, "subject to open and let in" any that may afterwards be born before the determination of the particular estate; and a sale may generally be authorized by the court where in case of a remainder to a class, those of the class who are *in esse* represent the others. In such case it is assumed that those who represent a particular class will protect the interest of all who have or may acquire an interest in the remainder.

"It is certain that if land be devised to a person for life, with an executory devise in fee to his children, the court cannot order a sale of the land before the death of any child, because, not being *in esse,* there can be no one before the court to represent its interests. Such was the case in *Watson v. Watson,* 56 N. C., 400. But if there be any children *in esse,* in whom the estate in fee can vest, a sale may be ordered, because, if their interests require it, they may be represented by their guardians; and this may be done, though all of the children of the class may not yet have been born. Such is the case now before us, with the exception that there is an executory devise to the unborn children of another person, depending on the event of the tenant for life dying without leaving issue. Can this latter circumstance make any difference? We think not, because the first class of children are the primary objects of the devisor's bounty; and as they have vested remainders in fee, and as their interests, as well as that of the tenant for life, will be promoted by having the land sold and the proceeds invested in other lands, or in stocks or other securities for their use, the court of equity is authorized, under the general power conferred by the act to which we have referred, to order a sale." *Ex parte Dodd,* 62 N. C., 98.

There is a full discussion of the question in *Scott v. Springs,* 132 N. C., 548. There *Connor, J.,* after reviewing the decisions and admitting that some are in conflict with the current authority in this State, said: "We have not discussed these cases for the purpose of overruling them, but to classify and distinguish them, and to show that the language—used in *Ex parte Dodd,* in respect to the power of the court to order a sale of land where there is an executory devise to persons unborn, there being members of a class next in remainder to a life tenant—has not been overruled or doubted." 132 N. C., 556. And again, on page 564: "Without regard to the act of 1903, the court has the power to order the sale of real estate limited to a tenant for life, with remainder to children or issue, upon failure thereof, over to persons, all or some of whom are not *in esse,* when one of the class being first in remainder after the expiration of the life estate is *in esse* and a party to the proceeding to represent the class, and that upon decree passed, and sale and title made pursuant thereto, the purchaser acquires a perfect title as against all persons *in esse* or *in posse.*" *Irvin v. Clark,* 98 N. C., 438; *Branch v. Griffin,* 99 N. C., 174; *Yancey's case,* 124 N. C., 151; *Hodges v. Lipscomb,* 128 N. C., 57; *Dunn v. Hines,* 164 N. C., 114; *Bullock v. Oil Co.,* 165 N. C., 64; 21 C. J., 986, 1003.

The commissioner's deed, however, was executed after the enactment of the statute of 1903. This act (C. S., 1744) provides that where there is a vested interest in real estate and a contingent remainder over to persons who are not in being, or when the contingency has not yet happened which will determine who the remaindermen are, there may be a sale of the property by a proceeding in the Superior Court at term time.

The proceeding in which the commissioner's sale of the land in question was decreed was instituted before the clerk; but the proceeding was not for this reason void or invalid. The irregularity is cured by the act of 1905, which is as follows: "In all cases where property has been conveyed by deed, or devised by will, upon contingent remainder, executory devise, or other limitation, where a judgment of a Superior Court has been rendered authorizing the sale of such property discharged of such contingent remainder, executory devise, or other limitation in actions or special proceedings where all persons in being who would have taken such property if the contingency had then happened were parties, such judgment shall be valid and binding upon the parties thereto, and upon all other persons not then in being: *Provided,* that nothing herein contained shall be construed to impair or destroy any vested right or estate." C. S., 1745.

In the present case Ruth Knowles and Annie Knowles, children of Mary Lewis, were of the class first in remainder after the expiration of the life estate; they were made parties to the special proceeding and were represented by their general guardian; they represented the entire class of remaindermen, including William and Robert, and the decree therefore bound the entire class. Since the first issue was answered by the court as a matter of law, the answer to the second will not be disturbed. The answer to the first issue will be modified so as to include the interest of William Knowles and Robert Knowles and of any afterborn child of Mary Lewis, and the judgment will be rendered in accordance with the modified verdict. The cost of the appeal will be taxed against the appellee.

Modified and affirmed.

B. B. WILLIAMS, TRUSTEE, v. R. E. DAVIS, SHERIFF, AND THE CITIZENS BANK.

(Filed 1 March, 1922.)

Liens—Agricultural Liens—Priorities—Mortgages—Deeds in Trust.

An agricultural lien, given by C. S., 2480, for the purpose of enabling the cultivation of the soil to raise a crop, is preferred by the statute to all others, except those given the landlord or laborer under C. S., 2481, when it is in proper form and duly registered; and it is preferred to liens of other kinds existing by mortgage or deed in trust on the same crop, to the extent of the amount advanced thereunder.

APPEAL by plaintiff from *Calvert, J.,* at the September Term, 1921, of WARREN.

This is a controversy as to the title and possession of a tobacco crop, which was sold by the defendant, Sheriff R. E. Davis, who collected and has in his custody the proceeds of the sale, subject to the decision of the court as to the ownership thereof. The court, upon the matter being submitted to it with a statement of the facts, entered judgment as follows:

"This action, coming on to be heard at said term of said court, and being heard before Hon. Thomas H. Calvert, judge presiding, and a jury trial having been waived in writing by the parties to said action, and the parties having agreed upon the facts and having submitted the same in writing to the court as follows:

"1. That one F. B. Newell, Jr., is now, and was at the time hereinafter mentioned, a citizen and resident of Warren County, State of North Carolina.

"2. That said F. B. Newell, Jr., during the year 1920 was engaged in farming operations in said Warren County.

"3. That on 3 January, 1920, said F. B. Newell, Jr., executed a deed of trust to B. B. Williams, trustee, wherein the grantor conveyed to said trustee an undivided one-half interest in a certain tract of land therein described, and also conveyed by said instrument, a one-half undivided interest in certain tobacco in the following language: 'And does also sell and convey and set over to the aforesaid Williams, trustee, a one-half undivided interest in and to one hundred acres of tobacco to be grown by Newell Brothers on the above described lands and adjoining tract of said Newell'; that said deed of trust was filed for registration in the office of the register of deeds for said Warren County on 5 January, 1920, and was registered in said office in Book 107, page 166, which book is one of those regularly used for recording deeds of trust on lands.

"4. That on 7 February, 1920, said F. B. Newell, Jr., executed to the citizens bank of Warrenton an agricultural lien for advances, according to the regular statutory form, to secure the payment of the sum of $3,000, and in said agricultural lien said Newell conveyed certain cattle and chattels, and gave a lien upon all crops to be grown during the year 1920 on the lands described in said agricultural lien; that said lien was duly filed and registered in the office of the register of deeds for said Warren County in Book 44, page 473, which book is one of those regularly used for recording agricultural liens.

"5. That about $2,000 of the amount secured by said F. B. Newell, Jr., in the deed of trust executed to B. B. Williams, trustee, as aforesaid, was used by said F. B. Newell, Jr., in the making and cultivation of the tobacco mentioned in said deed of trust.

"6. That the $3,000 secured by said F. B. Newell, Jr., in the agricultural lien executed by him to the Citizens Bank of Warrenton was made to said Newell at the time of the execution of said lien, and was used by said F. B. Newell, Jr., in the making, cultivation, and saving of the crops on the lands described in said agricultural lien.

"7. That the defendant R. E. Davis, sheriff of said Warren County, under a warrant issued to him by the clerk of the Superior Court of said county on 17 January, 1921, under section 2488 of the Consolidated Statutes of North Carolina, seized certain tobacco, the same being a part of the crops cultivated and grown by said F. B. Newell, Jr., on the lands described in the aforesaid agricultural lien and deed of trust, and after due advertisement, sold said tobacco on the premises of said F. B. Newell, Jr., at public auction to the highest bidder for cash, where and when W. B. Boyd became the last and highest bidder therefor, and was declared the purchaser thereof at the price of $1,700; that said tobacco was located in barns on the aforesaid lands of F. B. Newell, Jr., and was exhibited to the bidders at said sale; that at said sale the plaintiff, the Bank of Warren, was a competitive bidder for said tobacco; that said W. B. Boyd, the purchaser of said tobacco, complied with his said bid, and the defendant R. E. Davis, sheriff, as aforesaid, delivered said tobacco to said W. B. Boyd.

"8. That the land security embraced in the aforesaid deed of trust to B. B. Williams, trustee, was on 7 February, 1921, sold under the terms of prior deed of trust, but surplus was not sufficient to pay off the debt secured by said deed of trust.

"9. That the crops, cattle, and chattels embraced in the lien executed by said F. B. Newell, Jr., to the Citizens Bank have been exhausted and were not sufficient to pay off the debt secured by said lien.

"And the parties to this action having agreed in writing for the court to render such judgment as may be proper upon the foregoing agreed facts, it is now by the court, after hearing the arguments of counsel for plaintiffs and defendants, considered, ordered, and adjudged that the agricultural lien to the Citizens Bank, junior in date and registration to the mortgage or deed of trust to B. B. Williams, trustee, takes precedence of said deed of trust; and it is further ordered and adjudged that the proceeds derived from the sale of the tobacco be applied as follows: First, to the payment of the amount now due on the $3,000 secured by said agricultural lien; second, that the surplus, if any, shall be applied to the amount now due on the debt secured by said deed of trust to B. B. Williams, trustee. It is further considered and adjudged that the plaintiffs pay the costs of this action to be taxed by the clerk, and that the defendants go hence without day. THOMAS H. CALVERT,
Judge Presiding."

Plaintiff excepted to this judgment, and appealed.

B. B. Williams for plaintiff.
Tasker Polk and Murray Allen for defendants.

WALKER, J. There is no doubt that the instrument, under which the Citizens Bank asserts its right to the proceeds of sale now in the hands of the sheriff, is what is known as an agricultural lien, and was drawn and registered in accordance with the statute, C. S., 2480. Unless, therefore, the plaintiff can show a prior valid lien upon the crop of tobacco, the proceeds of which are now claimed by the defendants, the judgment of the court was correct. The lien of the Citizens Bank is, in form and substance, an agricultural lien, and as it was duly registered is entitled to preference over all other liens except the laborer's and landlord's liens, to the extent of the advance made under it. The instrument, under which the plaintiff claims these proceeds is in form and substance nothing more than a deed of trust to secure a debt. It is true the lien of it rests upon a part of the crop as well as upon the other property described in it, but this does not necessarily make it an agricultural lien, which is entitled to any special priority under the statute over others existing or otherwise. If the deed of trust was simply given to secure an antecedent debt due to the Bank of Warren, and was not in form, and in fact an agricultural lien, the Bank of Warren acquired no prior lien upon the crop of tobacco over the Citizens Bank. This is settled beyond dispute by the following cases in this Court: *Clark v. Farrar,* 74 N. C., 686; *Patapsco v. Magee,* 86 N. C., 350; *Wooten v. Hill,* 98 N. C., 48. There was nothing on the face of the deed of trust to B. B. Williams, trustee, to secure the debt due to the Bank of Warren, under which the plaintiff claims, to notify subsequent lienors, and especially the Citizens Bank, that it was an agricultural lien, or entitled to any more priority or preference than an ordinary mortgage or trust to secure a plain and simple debt owing by F. B. Newell, Jr., to the Bank of Warren, and when it was thus executed and registered the said bank took the risk of an agricultural lien being afterwards registered which would supersede it as a first lien upon the crop, and also any subsequent encumbrance by deed or mortgage which is not a lien of the kind mentioned and provided for in the statute (C. S., 2480), and peculiarly protected by it even against a prior encumbrancer.

With reference to this somewhat anomalous lien, which relates back and over-reaches prior encumbrances by special provision of the statute, *Justice Davis* said in *Wooten v. Hill,* 98 N. C., 53: "Section 1799 of The Code declares that the lien for advances made to enable the cultivator of the soil to make the crop, shall, as to the crop made by the aid of such advances, be good 'in preference to all other liens existing or otherwise, to the extent of such advances,' upon a compliance with the provisions of the statute, the only exception being that in favor of the landlord (or laborer), contained in the following section. Why does not the purchaser or mortgagee of the crop take with as full knowledge of the provisions of this section of The Code as of that which secures the rights of the landlord? He takes with a full knowledge that if advances shall be necessary to enable the cultivator to make the crop, and without which there would perhaps be no crop, such advances shall be a *preferred* lien upon the crop, made by reason of such advances, and that this preference shall extend to 'existing' liens. All laws relating to the subject-matter of a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. *O'Kelly v. Williams,* 84 N. C., 281; *Lehigh Water Co. v. Easton,* 121 U. S., 391. It impairs the obligation of no contract. Land is sold under execution—there is a lien on the crop for advances—the purchaser buys in subordination to this lien under section 1799 of The Code. *Dail v. Freeman,* 92 N. C., 351." It is said in *Herman v. Perkins,* 52 Miss., 813, that, although an agricultural lien may be junior in date to a mortgage, yet the right of the mortgagee is subordinate to the agricultural lien subsequently imposed by the mortgagor upon the crop. The statute giving the lien in Mississippi is not more absolute or imperative than ours. In *Stone v. Simpson,* 62 Ala., 194, a similar construction was placed upon the agricultural lien law of that State, and it was held that, under the statute, a crop lien had "precedence over all prior mortgages, and all prior liens, except that of the landlord for rent." The same construction has been placed upon similar statutes in New Jersey, Arkansas, and other states. *Vreeland v. Jersey City,* 37 New Jersey, 574; *Case v. Allen,* 21 Ark., 217. *Justice Bynum* observed in *Patapsco v. Magee,* 86 N. C., at p. 354: "It is needless to speculate why this provision is made by the statute. It is clearly so written, and can be conveniently observed, and if parties will willfully disregard it, they must abide the consequences."

This seems to be the law, with respect to such liens, both in this and in other jurisdictions where the same question has been raised, as appears above.

We must hold, as did the learned judge who presided below, that the prior lien upon the proceeds of the sale of the tobacco belongs to the defendant, subject to any just and legal charges thereon in favor of the sheriff or other officers for their services, and it will be so certified.

Affirmed.

BERTIE COTTON OIL COMPANY ET AL. v. ATLANTIC COAST LINE RAILROAD COMPANY ET AL.

(Filed 1 March, 1922.)

1. **Railroads—Burnings—Negligence—Sparks from Locomotive—Evidence—Prima Facie Case—Questions for Jury—Trials—Nonsuit.**

A *prima facie* case of negligence is established against a railroad when it is shown that a spark escaping from its locomotive burned plaintiff's property.

2. **Same—Instructions—Appeal and Error—Prejudicial Error.**

When such *prima facie* case is made out, it is sufficient, nothing else appearing, to warrant a finding for the plaintiff on the issue as to negligence, but it is not conclusive. The defendant may or may not introduce evidence in rebuttal at his election; but the defendant is not required to disprove negligence on its part. Throughout the trial the burden of the issue remains with the plaintiff.

APPEAL by defendant from *Calvert, J.*, at August Term, 1921, of BERTIE.

Civil action to recover damages for the negligent burning of plaintiff's seed-house and contents. Certain insurance companies, who claimed to be subrogated to the rights of the insured, were made coplaintiffs. The jury found that the property of the Bertie Cotton Oil Company had been burned by the negligence of the defendant, and assessed damages.

James S. Manning and Winston & Matthews for plaintiffs.
F. S. Spruill and Gillam & Davenport for defendant.

ADAMS, J. The defendant excepted to the following paragraph in his Honor's instructions to the jury: "As to the burden of proof on the first question, as to how the fire started, the burden is on the plaintiff to satisfy the jury from the evidence, and by its greater weight, that the property was set on fire by live sparks from the locomotive; if the jury should not so find, then you will answer the first issue 'No'; but if you do so find that, if the property was set on fire by live sparks from the locomotive, then the burden of proof shifts to the defendant to satisfy you by the evidence, and by its greater weight, that it used a competent and skillful engineer, and that the condition of the spark arrester was good, and if you so find you will answer this issue 'No'; otherwise, 'Yes.'" There are several decisions of this Court in which similar instructions have been approved. These are represented by *Grant v. R. R.*, 108 N. C., 467, and *Denny v. R. R.*, 179 N. C., 533. There are numerous decisions in which the instruction has been disapproved. These are represented by *Williams v. R. R.,* 130 N. C., 128; *Shepard v. Tel. Co.,* 143 N. C., 245; *Stewart v. Carpet Co.,* 138 N. C., 66; *Winslow v. Hardwood Co.,* 147 N. C., 276; *Overcash v. Electric Co.,* 144 N. C., 577. The decisions are conflicting.

When the plaintiffs proved that the property had been destroyed by fire escaping from the defendant's locomotive, they made a *prima facie* case of negligence for the consideration of the jury; or, as *Mr. Justice Pitney* says, such proof furnished circumstantial evidence of negligence; but it did not impose upon the defendant the burden of rebutting the *prima facie* case by the preponderance of the evidence. *Sweeney v. Erving,* 228 U. S., 233. The principle upon which this proposition rests has been stated as follows: "The burden of the issue, that is, the burden of proof in the sense of proving or establishing the issue or case of the party upon whom such burden rests, as distinguished from the burden or duty of going forward and producing evidence, never shifts, but the burden or duty of proceeding or going forward often does shift from one party to the other, and sometimes back again. Thus, when the actor has gone forward and made a *prima facie* case, the other party is compelled in turn to go forward or lose his case, and in this sense the burden shifts to him. So the burden of going forward may, as to some particular matter, shift again to the first party in response to the call of a *prima facie* case or presumption in favor of the second party. But the party who has not the burden of the issue is not bound to disprove the actor's case by a preponderance of the evidence, for the actor must fail if upon the whole evidence he does not have a preponderance, no matter whether it is because the weight of evidence is with the other party or because the scales are equally balanced." 1 Elliott on Evidence, 139. Standing alone, the *prima facie* case warranted but did not compel the inference of negligence; it furnished evidence to be weighed, but not necessarily to be accepted; it made a case to be decided by the jury, but did not forestall the verdict. *Sweeney v. Erving, supra.*

Recognizing the inconsistent and conflicting expressions in several of the decisions and the confusion that necessarily resulted, we undertook in a recent decision to review some of the cases in which the burden of proof is discussed for the purpose of formulating, or rather of restating the approved principle. *White v. Hines,* 182 N. C., 288. As there stated the rule is this: "After the plaintiff has established a *prima facie* case of negligence, if no other evidence is introduced, the jury will be fully warranted in answering the issue as to negligence in favor of the plaintiff, but will not be required to do so as a matter of law. When such *prima facie* case is made, it is incumbent upon the defendant to offer proof in rebuttal of the plaintiff's case, but not to the extent of preponderating evidence. The defendant, however, is not required as a matter of law to produce evidence in rebuttal; he may decline to offer evidence at the peril of an adverse verdict. If he offer evidence, the plaintiff may introduce other evidence in reply, and the jury will finally determine whether the plaintiff is entitled by the greater weight of all the evidence to an affirmative answer to the issue; for throughout the trial the burden is upon the plaintiff to show by the greater weight of the evidence that he is entitled to such answer." In that case it is further said, "After all the evidence is introduced, the vital question is not whether the defense specifically relied on is established to the entire satisfaction of the jury, but whether on the issue of negligence the evidence preponderates in favor of the plaintiff, and by this test the answer to the issue is to be determined." By the application of this principle the more recent decisions of this Court have been made to harmonize with the greater weight of authority on the question. It will be observed that in the instruction excepted to his Honor did not refer to the burden of the issue, but only to the burden of proof which was referred in the first instance to the plaintiff and afterward to the defendant.

His Honor very properly denied the motion for nonsuit, but we are of opinion that the defendant is entitled to a new trial for error in imposing on the defendant a burden beyond that which is required by law.

New trial.

SOUTHERN COTTON OIL COMPANY v. R. E. GRIMES.

(Filed 8 March, 1922.)

1. **Removal of Causes—Transfer of Causes—Venue—Parties—Nonresidents—Statutes.**

The county of the residence of the defendant, in an action upon alleged breach of contract, by a nonresident plaintiff, is the proper venue. C. S., 469, 470, 637.

2. **Same—Courts—Clerks of Court—Jurisdiction—Procedure—Pleadings.**

Where the clerk of the Superior Court orders the action upon contract removed to the county of the defendant's residence, and the plaintiff, a nonresident, has appealed therefrom to the judge, who in term orders the cause transferred and the defendant has complied with the requisites of the statute in filing a written motion in apt time, the action of the trial judge is a valid exercise of his jurisdictional authority.

3. Removal of Causes—Transfer of Causes—Motions—Statutes—Courts—Jurisdiction—Clerks of Court—Writing—Appeal—Appeal and Error.

Where the defendant has filed, in apt time with the clerk of the court a motion, with prayer for the dismissal of the action, but based upon sufficient allegations of improper venue, whereupon the clerk orders the cause removed to the proper county and the plaintiff appealed to the Superior Court, and the judge at term orders the cause removed, the fact that the defendant first moved to dismiss under the written motion does not affect the authority of the judge to order the cause removed, and on appeal to the Supreme Court a statement of record that defendant filed a written motion to dismiss, negatives the exception that it was an oral motion, not in conformity with the requirements of the statute.

APPEAL by defendant from *Cranmer, J.*, at the January Term, 1922, of PITT.

The plaintiff appealed from an order directing removal of the action from Pitt County to Martin County.

S. J. Everett for plaintiff.
F. G. James & Son for defendant.

ADAMS, J. The plaintiff is a nonresident corporation, and the defendant a resident of Martin County. On 5 December, 1921, the plaintiff brought suit in Pitt to recover damages for alleged breach of contract; and the defendant, before the time for answering expired, appeared before the clerk of the Superior Court of the latter county and filed a motion to dismiss the action. The clerk denied this motion and *ex mero motu* made an order of removal to Martin, and extended the time for the defendant to answer. The plaintiff appealed from this order to the court in term; and to an order made by his Honor removing the cause from Pitt to Martin the plaintiff excepted. The appeal presents for review the correctness of his Honor's ruling.

Anterior to the passage of the act to restore the provisions of the Code of Civil Procedure in regard to process and pleadings, the defendant, before the time for answering expired, was authorized to apply to the court in term for the removal of an action which had been brought in the wrong county. Pell's Rev., sec. 425. This change in procedure did not authorize the clerk to remove a cause on the ground of improper venue. Before the recent amendment the defendant had the right to lodge before the clerk his motion for removal, and after the answer was filed the clerk transferred the papers to the court in term in order that the presiding judge might pass upon the defendant's motion. Public Laws 1919, ch. 304; Public Laws 1920, ch. 96; *Zucker v. Oettinger*, 179 N. C., 277. The clerk's order of removal was affirmed on appeal, and his Honor, having jurisdiction to hear the defendant's motion, appropriately made an order to remove the cause to the proper venue, which in this case is the county of the defendant's residence. C. S., 469, 470, 637; *R. R. v. Stroud,* 132 N. C., 416; *Ryder v. Oates,* 173 N. C., 569. See Public Laws, Extra Session, 1921, ch. 92, sec. 15.

The plaintiff insists that a motion to dismiss an action for improper venue is not a motion for removal; and further, that the defendant's motion, whatever its nature, was not in writing as required by the statute. But the case on appeal states that the defendant "filed a motion to dismiss," and on appeal moved the court to transfer the cause to Martin County. The word "filed" negatives the idea of an oral motion, and the mere circumstance that the defendant first moved to dismiss is immaterial. Moreover, the judgment recites his Honor's exercise of discretion, presumably for the convenience of witnesses, in ordering the removal. There being no error, the judgment is

Affirmed.

B. F. LONG v. A. D. WATTS.

(Filed 8 March, 1922.)

1. **Constitutional Law—Taxation—Incomes.**

The authority given to the Legislature by the Constitution of 1868 to tax salaries, incomes, etc., is not affected or repealed by the amendment of 1920, but thereunder additional power is given to tax incomes when the property from which the same is derived is taxed, except in prohibited instances.

2. **Same—Salaries—Judges.**

The constitutional restriction on the Legislature not to diminish salaries of the judges during their continuance in office is still in force, unaffected or disturbed by the amendment of 1920, and though their income from other sources may be taxed, a tax on their salaries during their term of office is to diminish their income from such source in contravention of the express terms of the Constitution, Art. IV, sec. 18, further indicated by Art. I, sec. 8, providing that "the legislative, executive, and supreme judicial powers of the Government ought to be forever separate and distinct from each other."

3. **Same—Courts—Appeal and Error.**

It is the duty of the Supreme Court to pass upon the rights of one of the judges of the State as a citizen thereof, when he, in a case properly presented, denies the constitutional right of the State or one of its designated agencies, to tax his salary paid to him as one of its judges, as being in contravention of Art. IV, sec. 18, prohibiting the Legislature from diminishing the salaries of the judges during their continuance in office.

4. Same—Increase of Salary.

An increase of the salaries of the judges during a term of office is the fixing of their salary by the Legislature in such amount as in its judgment is a proper compensation for their services, and an attempt by an agency of the Legislature, either under actual or mistaken authority, to impose a tax thereon is an attempt to diminish these salaries during the term of office.

5. Same—Intent—Interpretation of Statutes.

The statute taxing salaries and incomes generally is presumed to have been passed with the knowledge by the Legislature of the constitutional inhibition to diminish the salaries of the judges during their continuance in office, also of the decisions of our courts thereon and the policy of the State in respect thereto, as gathered from the organic law; and where the statute is silent on the subject, the legislative intent will not be construed to authorize its designated agent to diminish such salaries by the imposition of a tax thereon, whether regarded as a tax upon an income or otherwise.

CLARK, C. J., concurring opinion.

APPEAL by defendant from *Devin, J.*, at February Term, 1922, of WAKE.

Civil action to restrain the defendant Collector of Revenue of North Carolina from collecting an income tax out of the official salary of the plaintiff, who is one of the Superior Court judges of the State.

From a judgment in favor of the plaintiff, permanently enjoining the defendant from proceeding to collect said tax, the defendant appealed.

A. L. Brooks for plaintiff.

Attorney-General Manning and Assistant Attorney-General Nash for defendant.

STACY, J. The plaintiff in this action is now and has been for a number of years the duly elected, qualified, and acting judge of the Superior Court for the Fifteenth Judicial District of North Carolina. His present term of office began on 1 January, 1919, and will continue for a period of eight years. The proposed tax which he calls in question is that which the defendant contends was levied by ch. 34, Public Laws 1921. The position of the defendant is that whatever barrier may have existed heretofore against the collection of such a tax, it has now been removed by the constitutional amendment of 1920. The scope and purpose of this amendment can best be ascertained from the amendment itself:

"1. Amend Art. V, sec. 3, by repealing the proviso in said section 'that no income shall be taxed when the property from which the income is derived is taxed,' and substituting in lieu thereof the following: '*Provided,* the rate of tax on incomes shall not in any case exceed six (6) per cent,' and there shall be allowed the following exemptions to be deducted from the amount of annual incomes, to wit: for a married man with a wife living with him, or to a widow or widower having minor child or children, natural or adopted, not less than $2,000; to all other persons, not less than $1,000; and there may be allowed other deductions (not including living expenses), so that only net incomes are taxed."

It may not be amiss to note just here that the preceding clause in said amended section, "The General Assembly may also tax trades, professions, franchises, and incomes," was not disturbed by the amendment; and this clause has been a part of the Constitution since 1868. Further, it may be noted that the amendment in no way changed the legislative authority to levy an income tax on salaries in general. It simply removed the prohibition against taxing incomes derived from property already taxed, and limited the maximum rate of such tax to six per cent.

The defendant notified the plaintiff in writing that he, as "Commissioner of Revenue, holds that under the income tax provision of the State Constitution and the statute enacted in pursuance thereof, all officials of the State, including . . . judges of the Superior Courts, are required to list and pay an income tax on their salary." He further added that his department would endeavor in every legal way to secure returns and the payment of such taxes. Upon receipt of this communication the plaintiff, on 28 January, 1922, caused a letter to be addressed to the defendant, calling attention to the grave doubt as to the correctness of his ruling, and asked if he would agree to submit a test case for decision so that the matter might be judicially determined on or before 15 March, 1922, this being the limit for the filing of said returns. "The purpose of this letter," he wrote, "is to inquire if you will not consent that an agreed case may be made up and the matter promptly presented to the courts for determination, so that the State, and its officers as well, may know what their respective duties and rights are as to this matter." This suggestion or request was promptly rejected, the defendant saying: "In my opinion these salaries are taxable, both under the State law and the Constitution, and I will endeavor through the machinery of the law to collect these taxes." Following receipt of this letter, the plaintiff instituted the present suit, asking for injunctive relief, and again offering, in his complaint, to agree upon the facts and to submit this as a test case for decision. Again his offer was declined. From a judgment in favor of plaintiff, the defendant appealed.

The defendant contends that under ch. 34, Public Laws 1921, every resident of the State is required to list and pay an income tax on his or her net income, and this, he says, by correct interpretation, includes the plaintiff's official salary, there being no express deduction allowed therefor in the statute. Defendant, therefore, contends that the act just mentioned contains a legislative direction and command that he collect such a tax. In reply to this, the plaintiff says that the defendant's construction of the statute runs counter to Art. IV, sec. 18, of the State Constitution, which provides: "The General Assembly shall prescribe and regulate the fees, salaries, and emoluments of all officers provided for in this article; but the salaries of the judges shall not be diminished during their continuance in office."

The question, then, presented for our decision is clear-cut, and it is this: Does a tax levied on plaintiff's official salary amount to a diminution thereof in derogation of the constitutional provision above quoted? If it does, its illegality must be conceded; otherwise, the injunction should be dissolved.

The case, in its ultimate effect and final analysis, involves the power to tax the compensation of all the judges in the State. On account of the individual relation of the members of this Court to the question, thus broadly stated, we can but regret that it might not have been settled in some other way. But the issue is forced, and we must meet it. Jurisdiction can neither be renounced nor denied. The plaintiff is entitled, by clear legal right, to invoke our decision in so far as his own salary is concerned, and this is a matter in which no other member of the judiciary can have any direct personal interest. There is no other appellate court to which, under the law, he or the defendant may go. This much is said, not by way of apology, but in recognition of the proprieties of the situation. No other choice is given to us, and we should be recreant to our duty if, when a cause is submitted by a citizen who alleges that his rights have been violated, or by an officer who wishes to know the law, we should shrink from deciding it. A majority of the members of this Court are owners of real estate in the city of Raleigh, but this would not be a sufficient reason for our declining to hear a case involving a tax levy by the commissioners of said city. *Allen v. Raleigh,* 181 N. C., 453. The only course for us to pursue is to consider the cause upon its merits and to decide it, as in other matters, according to the law appertaining to the case. For this position we have precedents from other jurisdictions and from the highest Court in the land, all of which will be cited hereafter.

For what purpose did the Convention of 1835 recommend that a clause be inserted in the State Constitution so as to provide that "the salaries of the judges shall not be diminished during their continuance in office?" Attorney-General Batchelor, in 1856, answered this question as follows: "The reason why this amendment was made to the old Constitution, the debates in the convention do not disclose to us; but it must have been that that body, influenced by the lessons of wisdom drawn from the experience of the past, desired to throw around the judiciary another defense and protection against any attack which might be made on it by the other branches of the Government, and to secure it against all influences which might sway it from the fearless, faithful, impartial, and independent discharge of its duties." 48 N. C., 544.

The instant provision certainly could not have been incorporated in the Constitution for the personal benefit of the judges. They come and go and, at most, hold office for but a brief period. The Constitution, on the other hand, was written for a continuing and growing State, and its provisions deal primarily with questions which affect the public weal. Whatever else may be said, it must be conceded that this clause, which forms a part of our organic law, was purposely added thereto by men of wisdom and experience, who understood the spirit and genius of our institutions, and who sought to place the independence of the judiciary beyond the field of controversy or debate. They were not ignorant of the melancholy experiences of the past and of the necessity of providing certain effectual checks and balances in this governmental framework which had been bequeathed to them by the fathers. History had also taught them the useful lesson that there is no surer way of losing the blessings of liberty than by meekly submitting to gradual encroachments, under color of law, and that no better instrument could be employed for that purpose than a weak, timid, and subservient judiciary. On the other hand, they were accustomed to look upon the courts, in this government of laws, as the strongest bulwark which they could devise to stand between them and those who would oppress them.

There is another section of the Constitution which may throw some light on the question now in hand. Art. I, sec. 8, provides: "The legislative, executive, and supreme judicial powers of the Government ought to be forever separate and distinct from each other." This has been said to embody succinctly the judgment of the people of North Carolina in regard to "the great principle of the separation of the powers." In this country those who make the laws determine their expediency and wisdom, but do not administer them. The chief magistrate who executes them is not allowed to judge them. To another tribunal is given the authority to pass upon their validity and constitutionality, "to the end that it be a government of laws and not of men." From this great political division results our elaborate system of checks and balances—a complication and refinement which repudiates all hereditary tendencies and makes the law supreme. In short, it is one of the distinct American contributions to the science of government. The people of North Carolina have ever guarded this principle with sedulous care. Indeed, so cautious have they been about its preservation that the veto power over acts of the Legislature has been withheld from the Governor of the State. In this respect, our own Constitution may be considered an improvement over the great model from which it was evidently taken, to wit, the Constitution of the United States.

But we are not without a number of precedents by which we may be guided in our present decision; for similar provisions are to be found in the constitutions of other states, and, indeed, the Constitution of the United States contains a provision to the effect that the compensation of the Federal judges "shall not be diminished during their continuance in office." This is the same language used in our own Constitution, and was evidently the pattern from which it was taken. It would seem, therefore, that we should derive much benefit from ascertaining the meaning and purpose of inserting this parent clause in the National Charter. In this regard, the records of the past may speak for themselves. Alexander Hamilton, writing in defense of the necessity of providing for an independent judiciary, observed: "The executive not only dispenses the honors, but holds the sword of the community; the Legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated; the judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment. . . . This simple view of the matter suggests several important consequences: It proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks." Federalist, No. 78.

And speaking more directly to the immediate point at issue, he said: "In the general course of human nature, a power over a man's subsistence amounts to a power over his will. . . . The plan of the convention accordingly has provided that the judges of the United States shall at stated times receive for their services a compensation, which shall not be *diminished* during their continuance in office. This, all circumstances considered, is the most eligible provision that could have been devised." Federalist, No. 79.

At a later period, the following views were expressed by John Marshall, who, if any, in regard to the Constitution, was entitled to speak with the weight of authority: "Advert, sir, to the duties of a judge. He has to pass between the Government and the man whom that Government is prosecuting; between the most powerful individual in the community and the poorest and most unpopular. It is of the last importance that, in the exercise of these duties, he should observe the utmost fairness. Need I press the necessity of this? Does not every man feel that his own personal security and the security of his property depends on that fairness? The judicial department comes home in its effect to every man's fireside; it passes on his property, his reputation, his life, his all. Is it not to the last degree important that he should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience? . . . I have always thought, from my earliest youth till now, that the greatest scourge an angry heaven ever inflicted upon an ungrateful and sinning people was an ignorant, a corrupt, or a dependent judiciary." Debates, Virginia Convention, 1829-1831, pp. 616, 619.

But possibly the position here sought to be maintained has not been stated more clearly and forcibly than by Mr. Wilson in his "Constitutional Government in the United States": "It is also necessary that there should be a judiciary endowed with substantial and independent powers, and secure against all corrupting or perverting influences; secure, also, against the arbitrary authority of the administrative heads of the Government.

"Indeed, there is a sense in which it may be said that the whole efficacy and reality of constitutional government resides in its courts. Our definition of liberty is that it is the best practical adjustment between the powers of the Government and the privileges of the individual.

"Our courts are the balance wheel of our whole constitutional system; and ours is the only constitutional system so balanced and controlled. Other constitutional systems lack complete poise and certainty of operation, because they lack the support and interpretation of authoritative, undisputable courts of law. It is clear beyond all need of exposition that for the definite maintenance of constitutional understandings it is indispensable, alike for the preservation of the liberty of the individual and for the preservation of the integrity of the powers of the Government, that there should be some nonpolitical forum in which those understandings can be impartially debated and determined. That forum our courts supply. There the individual may assert his rights; there the Government must accept definition of its authority. There the individual may challenge the legality of governmental action and have it adjudged by the test of fundamental principles, and that test the Government must abide; there the Government can check the too aggressive self-assertion of the individual, and establish its power upon lines which all can comprehend and heed. The constitutional powers of the courts constitute the ultimate safeguard alike of individual privilege and of governmental prerogative. It is in this sense that our judiciary is the balance wheel of our entire system; it is meant to maintain that nice adjustment between individual rights and governmental powers which constitutes political liberty."

The above quotations are selected to show the purpose, intent, and spirit of the framers of the Constitution and the reasons why they thought the particular provision, now under consideration, should be placed in the fundamental law of the land. The primary purpose of the prohibition against diminution was not to benefit the judges, but to attract good and competent men to the bench and to promote that independence of action and judgment so essential to the preservation of our governmental polity. To quote the language of *Chancellor Kent:* "It tends, also, to secure a succession of learned men on the bench, who, in consequence of a certain undiminished support, are enabled and induced to quit the lucrative pursuits of private business for the duties of that important station."

Conceiving this to be its purpose, and considering it in connection with the pervading principles of the Constitution, we must construe it, not as a private grant, but as a limitation imposed in the interest of the public good. It was placed there by the people themselves, and it must be observed by their representatives. To hold otherwise "would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men, acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid."

In this country, where the law is supreme, those acting in a representative capacity may not substitute their *will* for the will of the people as expressed in the original law. No one man or individual is above the law, and it is the duty of all to obey it.

A tax which indirectly takes from the plaintiff a part of that which, by law, he is entitled to receive for his service is clearly within the prohibition against diminution. Of what avail to him is the part paid with one hand and taken back with the other? Would it not, in reality, be the same as if such part had never been paid, or had been withheld in the first instance? To borrow an algebraic expression: If x plus y equal z, then x minus y must be less than z, if y be anything at all. This is self-evident, and so plain "that he may run that readeth it." Habakkuk, 2:2. But why elaborate the obvious? *Cui bono?* It is axiomatic, and universally accepted as a correct principle of law that that which is prohibited from being done directly may not be accomplished by indirection. The people themselves, for reasons which they deemed to be wise and satisfactory, and for their own purposes, have thought it proper to withdraw from the field of taxation the official salaries of their judges. Why should the defendant complain at this? He is but a servant of the people; and it is their will, not his, that is to be done.

But it is asked, Has not the State full power to tax her citizens, one and all? To this we answer, Yes. *S. v. Burnett,* 179 N. C., 741; *Thomas v. Sanderlin,* 173 N. C., 332; *S. v. Lewis,* 142 N. C., 626. Taxation is an incident of sovereign power, and, within the limits prescribed, it may be exercised according to the discretion of those who use it, save in respect to the objects of taxation which, for wise reasons, have been withdrawn from these general powers. The holdings of a judge and his income derived from other sources are proper subjects of taxation. The plaintiff makes no objection to this, but he does complain at the ruling of the defendant, which singles out his official salary as a special object of taxation, contrary to the Constitution which he has solemnly sworn to support.

If the tax in question be prohibited, it can find no justification in the taxation of other incomes in regard to which there is no prohibition; for, to be sure, doing what the Constitution permits affords no license to do what it prohibits. And let it be understood that we are now talking about a tribute, which the Government exacts, and not a gratuity or a voluntary contribution. Those who wish to pay more than the law requires will doubtless be permitted to do so, but this cannot affect the legal questions involved.

It was the evident purpose and intent of the people, when they inserted this clause in the Constitution, to prohibit any and every kind of diminution, direct or indirect, by taxation or otherwise. The Legislature is completely divested of the power to diminish the salaries of the judges in any manner or form whatsoever. Any other construction would do violence to the plain purport of the language employed and render the clause meaningless. The prohibition is general in its terms, and contains no excepting words. The reasons in support of its adoption, as publicly advanced at the time, outweighed those against it; and its wisdom has never been seriously questioned. On the other hand, time apparently has demonstrated that the Convention, which submitted the amendment, must have been endowed with prophetic vision. Their minds were bent on safeguarding, protecting, and preserving the independence of the judiciary; and this they considered of far more importance to the State than any revenue that could come from taxing the salaries of the judges.

It is true a different interpretation has been sought on several occasions, but each time with the same result. In 1898, Attorney-General Walser ruled that the salaries in question were not subject to a tax, and concluded his opinion with the following statement: "I deem it unnecessary to add anything to the able, convincing, and elaborate opinion of Attorney-General Batchelor hereinbefore referred to." Public Documents, 1899, Document No. 8, p. 95. Again, in 1902, Attorney-General Gilmer, in a full and exhaustive opinion, advised the members of this Court and the judges of the Superior Courts that their salaries were not subject to an income tax under the clause in question. This opinion was considered in conference and met with the unanimous approval of the members of the Supreme Court. "It was then resolved that the Court would consider this opinion of the Attorney-General as settling the matter therein discussed, to the same extent as if it were the opinion of this Court." *In re Taxation of Salaries of Judges,* 131 N. C., 692. See, also, *King v. Hunter,* 65 N. C., 603.

In *Purnell v. Page,* 133 N. C., 125, it was held that the State could not tax the salary of a Federal judge under the clause in the United States Constitution from which the one in our own Constitution was taken, and the above opinions were cited with approval and declared to be established law in that case. This amounted to a judicial dictum, which is more than an *obiter dictum.* 15 C. J., 953. And later, *Mr. Justice Walker,* writing in the case of *R. R. v. Cherokee County,* 177 N. C., 97, had the following to say: "In *Purnell v. Page,* 133 N. C., 125, it was held that the income of a Federal judge could not be taxed by the State, and *vice versa,* and that any attempt by the Legislature to impose such a tax would be futile, and when properly questioned would be declared void, and this position was conclusively maintained in a strong and able argument by the present *Chief Justice,* who referred to the opinions of Attorney-General Batchelor, adopted by the Supreme Court, composed then of *Nash, C. J.,* and *Pearson* and *Battle,* judges (48 N. C., 544), and that of Attorney-General Gilmer, 131 N. C., 692, approved by the Court as denying the power of the Legislature to tax the salaries of the judges, which would plainly be a diminution of them, forbidden by the Constitution."

Finally, in the case of *Evans v. Gore,* 253 U. S., 245, the United States Supreme Court (opinion filed 1 June, 1920) has set the matter at rest by holding that, under the above mentioned clause in the Federal Constitution, Congress was without authority to subject the salaries of the Federal judges to an income tax, citing with approval the above expressions in the North Carolina Reports, together with cases from the states of Pennsylvania and Louisiana. *Hepburn v. Mann* (Pa.), 5 Watts & S., 403; *New Orleans v. Lea,* 14 La. Ann., 194. It would be strange, indeed, for us to hold that the identical words in our own Constitution have a different meaning from those in the Federal Constitution in the face of this decision. Every point now before us seems to have been presented in the *Evans case,* and there decided against the contentions of the defendant here. See, also, the very recent case of *Gillespie v. Oklahoma* (opinion filed 30 January, 1922), where *Mr. Justice Holmes,* writing the opinion, cites the case of *Evans v. Gore, supra,* with approval, and the same reasons stated therein are again followed and reaffirmed.

Of all the states in which this question has been before the courts for decision, Wisconsin alone, in *Wickham v. Nygaard,* 159 Wis., 396, has taken the opposite view. This case, however, was decided in 1915, before the decisions of the United States Supreme Court in *Evans v. Gore, supra,* and *Gillespie v. Oklahoma, supra.*

But it is urged that the Legislature of 1921 increased the plaintiff's salary, and, therefore, the same or any subsequent Legislature may levy a tax against it without incurring the charge of having diminished it during his continuance in office. This argument is based on the contention that by adding an additional sum, the Legislature may then tax the whole so long as the tax does not exceed the increase. Or, to state it differently, the theory of the argument is that because the Legislature thought it necessary and proper to increase the plaintiff's salary, therefore they have the right, notwithstanding the constitutional prohibition, to take it away. That the power to add carries with it the power to subtract, at least to the extent of the addition. This would entirely destroy the constitutional provision we are now considering, frustrate its purpose, and make it indeed a snare and a delusion. Any construction which tends to defeat or to nullify a fundamental principle of constitutional law, come from whatever source or quarter it may, is palpably unsound. *Commonwealth v. Mathues,* 210 Pa. St., 400. The Constitution is not to be so easily discarded. The moment the increase took effect it became as much a part of the plaintiff's salary as the original amount, and the whole was then protected by the constitutional prohibition against diminution. An undiminished salary is a complete salary in its entirety and not a salary less a tax.

Again, it may be well to note that the amount of the tax can make no difference in dealing with the principle we are now discussing. If it be conceded that the Legislature has the power to levy the proposed income tax up to 6 per cent, it follows that a privilege or vocational tax, without limit, may be imposed on the judges; and this would destroy the constitutional provision now in question. The instant clause was adopted by the people themselves, and meaningless words were not employed by them in writing their Constitution.

Furthermore, we do not think it was the intention of the Legislature that the proposed tax should be collected. It was composed of wise and patriotic men, able and learned lawyers, and the present salaries of the judges were fixed by them with reference to the existing constitutional provisions. There was no suggestion by any member of the Legislature that these salaries should be taxed; and, of course, they were aware of the fact that they would not be, as the law had been construed otherwise. This was the basis and understanding upon which the different members of the Legislature arrived at what they thought would be a fair, reasonable, and adequate compensation. Therefore, to sustain the tax the will of the Legislature, as well as the above provision of the Constitution, must be set at naught. It is the duty of this Court to declare that such may not be done by executive order or departmental decree.

The amount of the proposed tax in the instant case is negligible, but the principles involved are important, and for that reason we may be excused for having treated the matter somewhat at length.

Prior to the amendment of 1920, the plaintiff's salary was on a parity with revenue derived from property already taxed. Neither was subject to an income levy, simply because the Constitution provided otherwise. The prohibition against levying an income tax on the latter has now been removed, but as to the former it still stands. This is an irresistible and incontestable conclusion to be derived from a reading of the plain words of the Constitution, and we are not at liberty to disregard its provisions. On the contrary, we have endeavored to show that the restraint in question is not only wise, and in keeping with the spirit of our institutions, but was adopted for reasons of the highest public policy. To speak of it as a technicality is a misnomer. There are no technicalities in the Constitution in the sense that term is ordinarily used.

After a careful and earnest consideration of the record, we answer the questions propounded as follows:

Is the plaintiff's income subject to tax? Yes. In this respect he stands on the same footing with other citizens of the State.

Is his official salary to be included in his taxable income? No. The Constitution clearly and plainly provides otherwise.

Let it be understood henceforth that this is the law as it is now written; and it can make no difference whether the tax be levied before or after the taking of office. The spirit as well as the letter of the Constitution must be observed. The judgment of the Superior Court, permanently enjoining the defendant from collecting the proposed tax on the plaintiff's official salary, was clearly correct. What the State pays or allows for his services as a judicial officer is not a proper item to be included in his taxable income.

Affirmed.

CLARK, C. J., concurs in all that is said in the opinion of *Stacy, J.*, and adds: There is no provision of law or the Constitution that purports to exempt the income of judges from taxation. What the Constitution provides, and which no statute can repeal, is that "the compensation" which the law shall allot from time to time for the support of the judges "shall not be subject to diminution." It can make no difference in what way the reduction in the allowance to the judges shall be made, or whether it is before or after the salary is fixed. When the Legislature has fixed the amount which they deem necessary as a salary for the support of the judges, they cannot diminish that amount in any mode. A tax upon a salary is necessarily a diminution of it.

This provision grew up in the wisdom of experience, because it was essential for the well-being of the public that those selected for the judicial function, who are to pass upon the delicate relations between man and man, and between the Government and the individual, shall be free from any possibility that the amount allotted for their support may be in the power of a hostile party, or a manipulated faction, in the legislative department who might at will reduce the means of livelihood of the judges.

The power to tax is not only the power to destroy, but whatever department in the Government can levy or reduce or impose taxes is the controlling power, and to guarantee to the judicial departments of the State independence in the discharge of the duties to which the people have assigned them, the Constitution provides not that the income of any judge is exempt from taxation, but that "the salaries of the judges shall not be diminished during their continuance in office"; and to say that the imposition of taxes upon that salary would not be a diminution of the salary is a proposition that no man can assert in the presence of any taxpayer.

Formerly the judges in England were removable at the will of the executive. This made the king an absolute monarch at a time when the kings claimed also the right to share in the levy of taxes. The conflict between the executive and the legislative power over the question of taxes brought about the great civil war in England, the decapitation of one king, and the exile of another.

When the power of taxation was transferred by the revolution of 1688 to the legislative department, and as a further guarantee the kings were deprived also of the right to veto legislation, there still remained the power in the king to control the action of the courts by the appointment and removal of the judges. When the American Constitution was framed, the necessity of the absolute independence of the three departments of Government—legislative, executive, and judicial—was asserted, and to secure the latter from absolute subjection by removal from office at the will of the executive, they were declared irremovable except by impeachment; and to avoid their subjection to the legislative department their independence was guaranteed by a provision that while their salaries, or their allowance for necessary support, were necessarily fixed by the Legislature, once fixed they could not be reduced, and, of course, if their salaries could be taxed for any purpose this provision would be a nullity.

In 1862, in the crisis of the great Civil War, when *Chief Justice Taney* and a majority of the Supreme Court were faced by a hostile majority in Congress, this provision was disregarded by a statute. That court rose equal to the occasion, and maintained the vital guarantee of judicial independence conferred upon them by the Constitution of 1787. *Chief Justice Taney* promptly called the matter to the attention of Salmon P. Chase, then Secretary of the Treasury, and one of the leaders of the opposite political party, and asserted the determination of the court to uphold this constitutional guarantee of the independence of the judges in a most vital respect. *Judge Chase*, although a strong partisan (and later *Chief Justice* of the Court himself), valued his oath of obedience to the Constitution and the absolute necessity of an independent judiciary which would become a dependent one if the legislative department could at will reduce its compensation. He abandoned the attempt to exert the power of Congress to diminish by taxation the "fixed" compensation allowed to judicial officers.

There the matter rested, until recently an attempt was again made to place the judiciary in the power of Congress by asserting the right to reduce their compensation. The matter was brought before the Court within the last two years in *Evans v. Gore,* 253 U. S., 245, and the bulwark of the independence of the judiciary was unqualifiedly sustained in that case.

In this State, while we had adopted the English guarantee of the irremovability of the judges at the will of the executive, we did not place in our Constitution at Halifax, in 1776, a guarantee of the independence of the judiciary by forbidding legislative reduction by taxation, or otherwise, of the salaries allotted. In the third decade of the last century there were legislative threats to coerce the judicial department, and when the Convention of 1835 met, the people of this State wisely saw fit to put in their Constitution the guarantee of the independence of the judiciary in the same words that had been placed in the U. S. Constitution, nearly fifty years previously, and which now appears in every Constitution in the country, to wit: "The judges shall at stated times receive for their services a compensation, which shall not be diminished during their continuance in office."

There are but 25 judges in North Carolina whose offices are created by the Constitution, and these only, and seven heads of the Executive Department, are protected by this constitutional guarantee. It is true that the plaintiff's attorney states that the diminution of the aggregate salaries of these judges by this taxation amounts to the sum of only $1,000, approximately, and the widespread discussion by those who would destroy the independence of the judiciary seems based upon the idea that the independence of the judiciary is not worth that much to the public. But the men who framed the Constitution of the United States, and those who amended our Constitution in this respect to conform thereto in 1835, did not estimate the value of a constitutional guarantee by such standard. It is of infinite importance to the people of this State who know what tremendous influence can be brought in time of stress by great aggregations of capital to control legislation, and, if possible, to influence or subject the judges to the tyranny of that power.

It has been asserted that the amendment of 1920 destroyed the long and sacred independence thus guaranteed to the judges. That amendment was submitted in the following words, and has no possible bearing upon the question now before us: "Amend Art. V, sec. 3, by repealing the *proviso* in said section that no income shall be taxed when the *property* from which the income is derived is taxed, and substituting in lieu thereof the following: *Provided,* the rate of tax on incomes shall not in any case exceed 6 per cent, and there shall be allowed the following exemptions, to be deducted from the amount of any incomes, to wit: For a married man with a wife living with him, or to a widow or widower having minor child or children, natural or adopted, not less than $2,000; to all persons not less than $1,000; and there may be allowed other deductions (not including living expenses), so that only net incomes are taxed." It may be seen at once that this amendment has no reference whatever to the constitutional guarantee that the "compensation" allowed the judge shall not be diminished, but merely strikes out the provision that "the income shall not be taxed when the *property* from which the income is derived is taxed, and *limits* the rate of taxation to 6 per cent, the latter (the limitation) being the real object in view.

The salary of the judges is not derived from "property," but is simply an allowance for their support, and if any is left over at the end of the year, such remnant becomes "property," and is taxable as such, as was held in *Purnell v. Page,* 133 N. C., 129, and this amendment does not in the remotest degree apply thereto in any aspect. Furthermore, if the amendment was not intended for the entirely different purpose of limiting rate of taxation upon the incomes of great corporations and other large aggregations of wealth down to 6 per cent, it has had that effect. In England the income tax is graduated and runs from 1 to 84 per cent, and a heavily graduated income tax has been found absolutely necessary in the United States, France, and other countries, both for the support of the Government and that great aggregations of wealth should be reduced by taxation by graduated scale, while those with small means should be exempted or taxed much more lightly.

When recently the United States Congress reduced the graduated income tax on large amounts from 68 per cent to 50 per cent there was strong censure from the vast body of the people, who felt that the burdens on inordinate wealth should not be reduced; while in this State, almost without discussion, the limitation on the income tax was reduced to 6 per cent! Possibly this was the true object of that amendment, and it can be seen readily that this amendment has no reference whatever to the constitutional provision, which, following the example of the U. S. Constitution, was adopted to guarantee to the judges immunity from hostile legislation in the reduction of their salaries, and which clause in the Constitution remains unaltered.

While the salaries of the judges can be fixed from time to time, it is with the provision that they cannot be diminished. On the contrary, as to the executive officers, who are: the Governor, Lieutenant-Governor, Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, and Attorney-General—seven officials—it is provided in the Constitution, Art. III, sec. 15, that their salaries shall neither be increased nor diminished during the time for which they shall be elected. This shows an intention on the part of the organic instrument that while those seven officers are protected from a diminution of their salaries, there is a prohibition against their being increased. There is no such fear shown as to the possible influence of the judiciary who are protected solely against diminution of their allowance.

The history of this State shows that there has at no time been a fear of the possibility of excessive increase in the compensation allowed to the judges. It is a well known fact that the salaries of the highest Court in this State are very largely less than that allowed to the lowest judges on the Federal bench, and that the salaries of the judges of this Court are far less than the average salary allotted even to the judges of the other states, irrespective of size, wealth, area, or population. Indeed, in at least two states the salaries of their state judges are three times higher than the support granted to any judge of this State. Those who created our Constitution were not unaware that there was no fear, and their judgment was correct, of excessive salaries for the judiciary in this State. The object sought, as in the U. S. Constitution, was to protect the judges from being in the power and at the mercy of hostile legislation, which otherwise could diminish the salary of the officers selected by the people to construe and guard the constitutional rights of its citizens.

But it has been said that if the salaries of the judges cannot be reduced they are "a privileged class." This guarantee that they shall not be placed in the power of a possibly hostile Legislature is not given to the judges as a privilege to them, but as a protection to those who need an impartial administration of justice, unaffected by unfriendly influences.

It makes a privileged class only in the same sense as the exemption from State taxation of the salaries of all Federal officers in the State, many hundreds or thousands in number, including the salary of a U. S. Cabinet officer (for the last 8 years), two U. S. Senators, ten Congressmen, three United States judges, hundreds of postmasters and United States officials of all kinds, while the only State officials whose salaries are exempted from taxation are the seven State officers in the Executive Department named in the Constitution, and the State judges referred to in this section of the Constitution, who are at present 25 in number—and the exemption of these few was made for historical and constitutional reasons of sufficient importance to have such exemption placed in the Constitution, not as a compliment or privilege to them, but as a protection to the public at large that they might be free from any possible improper influence in the discharge of their important duties.

The exemption of the salaries of all these Federal officers from State taxation amounts to a very large sum, and makes a very large "privileged class," if that makes such a class. The provision that the salaries of the judges shall not be diminished while in office no more makes "a privileged class" than the provision in the Constitution which exempts from poll tax all men over fifty years and all women. It is no more a special privilege than Art. V, sec. 5, of the Constitution, which exempts municipal property from all taxation, and also authorizes the General Assembly to exempt property held for educational, scientific, literary, charitable, or religious purposes, libraries, household and kitchen furniture, agricultural implements, and the personal property of every citizen not exceeding $300. This $300 personal property exemption removes from the families of the working people the fear of the sheriff's visit to every little home or farm which may now retain free of taxes the family milch cow, household and farming utensils, etc. This last exemption, though authorized by the Constitution ever since 1868, was not increased from $25 to $300 by statute till certain influences were seeking a restriction of taxation on great incomes by a limitation of 6 per cent, and as soon as that limitation was imbedded in the Constitution there were instantly strenuous but justly unsuccessful efforts to repeal the legislation by which the small belongings of the poor had been exempted by statute to the amount of $300, and it was earnestly sought to again reduce the exemption to $25 when their votes were not needed to restrict the income tax to a limitation of 6 per cent on great masses of wealth.

Prior to the restriction of the income tax to 6 per cent, the power to tax all incomes was in this State as unlimited as it still is under the United States and other Governments, and if the salary of the judges had been taxed, contrary to the plain language of the Constitution, as income, and not protected from diminution by taxation, it would have been possible to have laid any tax whatever upon judges not entirely agreeable to the political or personal views of a majority of any Legislature, and thus have forced their removal. Even though since the limitation of income tax to 6 per cent (though this was done, not for the protection of the judges, but for the benefit of an entirely different class), if the salaries "were subject to diminution" it would still be possible for the Legislature to lay a tax upon a judge as "exercising a vocation or calling," at any rate the Legislature might see fit. The only protection and guarantee to the judiciary department in this State is that wisely laid by the Convention of 1835, copied from the Constitution of the United States, which provides that the salaries of the judges shall not be diminished during their term of office.

It has been said, though not by the distinguished counsel who appeared for the defendant in this case, that this guarantee by the Constitution against the diminution of the salaries of the judges by legislative enactment is "antiquated and a technicality." In this manner the entire

Constitution, built upon the experience of the ages, and providing for the protection of the weaker classes of society against the greed and arrogance of the powerful, would cease to exist by merely labeling any constitutional guarantee "antiquated and a technicality."

The Constitution of a State and of the Union is the very foundation of law and order. It is the protection of the weak against the strong, and safeguards the masses against the machinations of the powerful combinations of selfish interests. It is the bulwark against anarchy, corruption, and the deadly, insidious, and ever-active power of "high finance," but is without strength unless guarded and upheld by an independent judiciary. Thus upheld, the Constitution—State and National—is to the people at large "the shadow of a great rock in a weary land."

Nothing could be more disagreeable to the men whom the people of this State have thought worthy to place in the chief administration of the laws of the State than to have a controversy raised as to the constitutional guarantee of the small compensation allowed them for their support, from hostile attack from whatever source it may come. There is not one of them who would not rather have paid many times over the petty sum demanded by the defendant tax collector in this case but they had their duty clearly marked out before them by an oath to protect the administration of justice, pure and uninfluenced by any hostile power, and to maintain and support the Constitution of the State. Each and every member of the judiciary of this State must feel that they are only the temporary depositories of that power, and that it is their duty to pass it on to their successors protected by the guarantee which is given in the Constitution, not for the benefit of themselves, of their predecessors, or their successors, but as a guarantee that by whomsoever administered there can be no undue influence possibly exerted to control the occupants of the bench.

The Court did not put this provision in the Constitution, but it was inserted by the Convention and people in 1835, in view of its urgent necessity. The Court cannot strike it out because we, or anybody else, might not approve it. We must follow the long-settled construction and the common-sense meaning that to *tax* a salary necessarily "diminishes" it to that extent. The Court is under the Constitution, and cannot change it at will.

The defendant in this case, as appears by the record, when asked to submit to the courts an agreed case for the construction again of this provision of the Constitution, so as to minimize as far as possible the clamor that was being aroused in certain quarters, either to intimidate or to annoy the judges, who were simply doing their duty, curtly refused to do so, and stated that "*he* had decided" that the constitutional provision did not protect the judges from taxation of their salaries, and that "he intended to collect the amount he had notified them that they must pay."

When, overruling a previous decision of the Tax Commission, the defendant, of his own will, decided to remit to a great corporation the sum of $110,000 in taxes, which must be made good by being collected from other and poorer persons, there was no one to be found then to seek, and he certainly did not ask, judicial review of his act. To make good this $110,000 by collecting unconstitutionally $1,000 a year out of the judges will take 110 years, and if interest is counted it will take between 300 and 400 years—very poor financiering for the Revenue Department.

There can be no vaster or more irresponsible power than this, which can shift at will the burden of taxation from one class to another, without review, in a State which professes to live under "a government of laws and not of men." It can therefore never be known in a legal way whether the conduct of the defendant on that occasion was valid or not. No one seemed called upon to present that great matter to judicial construction for a legal ascertainment of the facts and the law on so great a matter, but when he attempted to destroy the constitutional bulwark for the protection of the courts in their integrity, though the amount was small, the plaintiff, true to his duty and to the best traditions of his profession, and of his office, and to the Constitution that he had sworn to obey, interposed by an appeal to the courts.

Years ago George W. Kirk, when presented with a writ from the courts, treated it with indignity, and said that "it had played out." The people of North Carolina made their reply to that indignity to their Constitution and laws and their judiciary in a manner that will not soon be forgotten.

If the defendant tax collector desired to submit this question to the courts because he thought that the long line of judges had erred, it was his right to do so; and, on the other hand, it is to the perpetual honor of the plaintiff that he met the issue squarely, unintimidated by organized effort put forth to intimidate the courts or to convince the public that they were corrupt. The $1,000 or more which the defendant might have collected by taxation, if the judges of the State had been wanting in courage to face the concentrated abuse that has been heaped upon them, would have been small compensation for this attempted violation of the Constitution, contrary to the uniform decisions of the courts of this State and of the United States.

The paragraph in question was placed in the Constitution of this State, as already said, by the Convention of 1835, being copied from the same provision in the Constitution of the United States, and has been kept unchanged to this date. There was no question raised of its literal and plain meaning. Twenty-one years later, in 1856, the reason for it was stated in an admirable opinion by Attorney-General Batchelor, approved by that able Court—Frederick Nash, Richmond M. Pearson, and William H. Battle. From that hour to this that decision has been followed, and often reiterated in the Supreme Court of the United States and by the courts of this State, and always upon the same ground, that it was a constitutional guarantee to the judges of their independence, for if it did not mean that its insertion was useless. Not only has this been repeatedly decided by a long line of judges, among them many of the ablest and purest men who have adorned the history of our State, but they have all acted upon and accepted it as the true and only construction of the Constitution—among them the able and distinguished gentleman now the Attorney-General of the State, while at one time he himself occupied a seat upon the Supreme Bench of North Carolina.

In *Purnell v. Page,* 133 N. C., 125, now nearly twenty years ago, the Supreme Court of this State, in an unanimous opinion by a bench of five judges, representing both political parties, held: "The Legislature is presumed to know the law, and when it levied a tax upon incomes it did not intend to authorize the tax upon incomes exempt by the Constitution of the State or Federal Government from such taxation. The act of the officer in attempting to collect such tax is not authorized by law, and he was properly restrained from selling." This interpretation has been approved as late as 177 N. C., 97, and there has been nothing in the decisions of this Court or of the United States Supreme Court contrary to the above decisions and conduct of the judges in this matter.

We would impute to the defendant, upon the record, no motive other than his zeal of increasing his tax collections by the sum of $1,000 or more, even though this must be done in violation of the Constitution. The brief of the distinguished counsel for the plaintiff points out that instead of obtaining this petty sum by violation of the Constitution, the defendant could largely increase the public revenue, not by violation of the Constitution, but in accordance with its provisions and decisions of this and the United States Supreme Court. The brief says that if the defendant desired to enforce the Constitution as it is written, and as he knows it has been decided by the courts of this State and of the United States, he might well turn to the Constitution, Art. V, sec. 3, which provides: "Laws shall be passed taxing, by uniform rule, all moneys, credits, investments in bonds, *stocks,* joint-stock companies, or otherwise; and also all real and personal property, according to its true value in money." The defendant tax collector knows, as every man in the State should know, that this constitutional provision, which not only all office holders, but all voters are sworn to obey, is not being complied with. To quote the language of the distinguished counsel for the plaintiff, "The Constitution demands that a tax shall be paid by corporations upon their property, and that the *holders* of the stock of these companies shall likewise pay a tax on about 800 millions of dollars of 'stocks,' which are allowed to escape taxation in violation of this explicit requirement of the Constitution," and counsel asked that "this be settled by the courts and in accordance with the Constitution and the laws of the State and not otherwise"; and also further suggests that "this defendant might find it consistent with his duty and oath of office to inquire into the status of large property holders of this State and see whether or not they are paying taxes as the Constitution requires, rather than to undertake to collect taxes from those which the Constitution expressly exempts."

To this may be added that while the amendment of 1920 provides that "incomes from property already taxed may be taxed," by recent legislation (sec. 306 (5), ch. 34, p. 210, Laws of 1921): "Dividends from stock in any corporation, the income of which shall have been assessed and the tax on such income paid by the corporation" shall not be taxed. That is, not only the money invested in "stock" by individuals and others (amounting in this State possibly to 800 or a thousand million dollars) is absolutely exempted from taxation in defiance of the constitutional provision, Art. V, sec. 3, that "all stocks" and other personal property shall be taxed, but it is now further provided that the *income* or dividends received by the stockholders, and which is paid into their pockets from such stock is exempt from taxation in spite of the recent amendment that "incomes derived from property taxed" (even if the stock had been the property of the corporation) shall be taxed. And it further provided, by a more recent act, ratified 15 December, 1921, that banking corporations may deduct from taxation 5 per cent of their surplus and undivided profits, besides, also, the total amount of the surplus and undivided profits invested in State or United States bonds or the bonds of the Federal Farm Loan Banks and Joint-stock Land Banks.

It will be seen that practically all the "canned wealth" of the State is thus exempted from all taxation in violation of the express language of our Constitution. The defendant tax collector, instead of attempting to replenish his funds by $1,000 in violation of the Constitution of this State, and of the decisions of the State and Federal Courts, might add many millions of dollars to his tax collections by obeying the highest law, the Constitution of the State, as plainly and unmistakably set forth and as construed by numerous decisions of this Court to which he has ready access.

If the defendant will thus take steps to execute the requirements of the Constitution as held by many decisions of this Court, the overwhelming burden of taxation upon the farmers and laborers and people with small means, all the producers of wealth, will be largely reduced and the burden placed where the Constitution requires it, upon the corporations and others possessed of inordinate wealth who are being permitted by the defendant to enjoy without question, by him, exemptions from taxation contrary to the Constitution which the defendant and all others have taken oath to support.

The above is written upon the theory that the defendant is seeking to uncover and collect taxes that are withheld which the Constitution requires shall be collected, and that by this action the defendant is seeking a decision along that line.

North Carolina is a growing State, increasing in population and wealth, but taxation is increasing to a still greater extent. We need better roads and better schools, and there are ample sources from which to derive revenue for those and all other necessary purposes if properly apportioned according to the Constitution, but when, as there is ground to believe, vast quantities of wealth in idle hands, largely "canned wealth," so to speak, are exempted entirely, as in instances above referred to, contrary to the Constitution, or taxation thereon is limited by an amendment to that effect if not passed for that purpose, there will be continued and growing unrest.

This unrest cannot be met by attempting to exact $1,000 or more illegally from a small class of public servants, nor by the excitement of *propaganda* against them for not yielding a trust placed in their hands, but respecting the conduct of their predecessors and preserving the protection due to those who shall come after them.

The surest guarantee of the prosperity of the people is an equal and a just administration of the law by fearless officers and a just apportionment of the public burdens by taxes graduated according to the capacity of those called upon to contribute and not in an inverse ratio by being placed most heavily upon those least able to resist an unjust apportionment of these burdens.

It appears from the United States financial report that throughout the Union there are thirty thousand million dollars of "tax-free" bonds, which pay no part of the burdens of government. This is in addition to the "stocks," which, in this State, contrary to the Constitution, are also exempted from taxation. In some few states the Constitution does not require, as ours clearly does, that all stocks shall be taxed. It also appears that there are many hundreds of men in the Union with yearly incomes of over one million dollars each, one of them really a resident of this State, but nominally resident elsewhere, with an income of three millions, and therefore not even paying the limited 6 per cent income tax, and with a capital, gathered up in 30 years, of over 100 millions. Who lost it? At the same time there are 5 millions of unemployed men throughout the country!

As this controversy to collect in $1,000 contrary to law has been largely carried on outside the courts by methods intended to intimidate the judges to decide the matter wrongfully for fear lest they should be charged with being influenced by the petty amount involved, it is not inappropriate that these things should be said. The just and intelligent people of this State can be trusted to decide correctly all questions affecting the public welfare or their rights if the facts are fully and fairly laid before them.

E. MODLIN v. GARRETT & LAWRENCE.

(Filed 8 March, 1922.)

1. **Appeal and Error—Instructions—Requests for Instructions.**

   Where the controversy depends almost entirely upon the jury's determination of the facts from the evidence, an instruction is correct that the jury is the trier of the facts, with right to decide upon the truthfulness of the witnesses and the weight to give their testimony, and that it should carefully scrutinize the evidence, upon which the court had no opinion; and an exception in this case is untenable, in the absence of requests for specific instructions, that reversible error was committed by the court in leaving the jury insufficiently instructed and not applying the rule of evidence to the testimony.

2. **Appeal and Error—Newly Discovered Evidence—New Trials—Argument—Opinions.**

   A petition filed in the Supreme Court for a new trial upon newly discovered evidence must be submitted without argument, and will be decided upon scrutiny of the affidavits without filing opinion.

APPEAL by defendants from *Kerr, J.*, at February Term, 1921, of HERTFORD.

Upon the issues submitted the jury found that the defendants were indebted to the plaintiff in the sum of $155 and interest, and that the plaintiff was not indebted to the defendants by way of counterclaim. Judgment accordingly. Defendants appealed.

John E. Vann for plaintiff.
W. R. Johnson, and Winston & Matthews for defendants.

CLARK, C. J. This is an action begun before a justice of the peace to recover from the defendants the sum of $150, balance claimed on timber sold by the plaintiff to them, and $5 for other timber wrongfully cut from plaintiff's land.

The first, second and fourth assignments of error are solely as to matters of fact. The exception of the defendants that the charge was not clear and intelligent, and that there was an expression of opinion on the facts as to the $5 cannot be sustained. The third exception was that the court charged the jury, "You are the triers of the fact; you have the right to decide upon the truthfulness of any person upon the stand, and you will determine how much weight to give his testimony. You are to carefully scrutinize the evidence. The court has no opinion of its own, and does not intend to convey any. You will take these issues and be governed by the evidence." The defendants contend that this leaves the jury without chart or compass, and is a restriction upon the defendants' evidence; and further, that the rule as to the testimony of the parties was not charged.

It is true the charge as to the weight to be given to the testimony of the witnesses might have been stated more fully, but there was no request to charge more fully, and we do not find any error in the charge as given. Scrutiny of the case on appeal shows that the controversy turned almost entirely upon the determination of the facts in regard to which the jury are proper triers.

There is also filed in the case an application for a new trial for newly discovered evidence and an answer thereto. In regard to this the settled practice of the courts is that such petition be submitted without argument, and will be decided by the Court upon scrutiny of the affidavits without filing any opinion. *Steeley v. Lumber Co.*, 165 N. C., 35; *Johnson v. R. R.*, 163 N. C., 453.

Upon consideration of the whole case the motion for new trial for newly discovered testimony is denied, and on the case proper we find

No error.

THE J. L. THOMPSON COMPANY v. HANNIBAL POPE ET AL.

(Filed 8 March, 1922.)

Equity—Injunction—Receivers—Courts—Discretion.

Where, in a suit in the nature of a creditor's bill, the plaintiffs applied for injunctive relief and the appointment of a receiver, the court may continue to the hearing the preliminary injunction and dismiss the temporary receivership, the latter being within his discretion and properly exercised, especially when it appears that the receivership was for property greatly disproportionate in value to the amount demanded in the action.

APPEAL by plaintiff from *Cranmer, J.*, at chambers, 23 November, 1921, from HARNETT.

Civil action for debt, wherein plaintiff seeks to avoid certain conveyances as having been executed in fraud of the rights of creditors. He also asked for the appointment of a receiver, and for a restraining order, to the end that certain personal property might be held pending the determination of the rights of the parties. His Honor named a temporary receiver, and granted the plaintiff's application for an injunction, restraining the defendants from further disposing of any of the property described in the complaint. Upon the return of the initial order, the receivership was vacated and the receiver discharged, but the restraining order was continued to the hearing. Plaintiff appealed.

L. J. Best for plaintiff.
Young & Best for defendants.

STACY, J. The plaintiff brings this action in the nature of a creditor's bill, and alleges that the defendants have disposed of certain real estate, worth $20,000, with intent to defraud their creditors. Plaintiff's claim is for merchandise and supplies furnished, amounting in value to approximately $1,561.13. The correctness of this account is denied. At the instance of the plaintiff a temporary receiver was appointed, and the defendants restrained from disposing of the crops and certain personal property. Upon the return of said motion the receiver was discharged, and the restraining order continued to the hearing. The plaintiff appealed, because his Honor vacated the receivership and ordered the receiver discharged. We fail to see wherein the plaintiff's rights have been prejudiced by this action. True, it is stated in the record that the restraining order was also dissolved, but this does not so appear from the judgment.

The following is taken from the statement of case on appeal: "At the hearing the plaintiff introduced and relied upon the amended complaint and affidavit of J. L. Thompson Company in support of its motion, and the defendants, in support of their motion to vacate, relied upon the affidavit of Hannibal Pope, and additional affidavits as to the value of the land described in the complaint, which valuation was alleged by the defendants and admitted by the plaintiff to be approximately $20,000."

It would hardly seem commensurate with the rights of the parties to have a receiver appointed to take charge of property worth approximately $20,000, where the plaintiff's claim, in addition to being disputed, amounts to no more than $1,561.13, unless there were other and additional allegations to those appearing on the instant record. "The appointment of a receiver *pendente lite* is not a matter of strict right, but rests in the sound discretion of the court, and such order will not be made unless from all the circumstances it appears that greater injury will ensue from leaving the property with its present possessors than from its removal into the custody of such officer, and in this regard the interest of both parties will be considered, and the dangers of loss or injury must be imminent." *Hanna v. Hanna,* 89 N. C., 68.

No sufficient reason for disturbing the judgment has been assigned.

Affirmed.

HERBERT JENKINS v. PAUL H. PARKER.

(Filed 8 March, 1922.)

Instructions—Evidence—Questions for Jury—Trials—Deeds and Conveyances—Descriptions—Title.

Where the plaintiff makes out a *prima facie* case of title by his chain of conveyances, and the defendant offers deeds and muniments tending to establish his superior or paramount title to the lands, and there is conflicting evidence as to whether the defendant's deeds cover the *locus in quo,* an instruction to the jury to find the issue for defendant if they believed the evidence is erroneous as invading the province of the jury to decide upon whether the defendant's deeds covered the subject of the litigation.

APPEAL by plaintiff from *Calvert, J.,* at October Term, 1921, of HERTFORD.

Civil action for trespass, involving title to a tract of land. There was a second cause of action set up in the complaint, but this is not now before us for consideration.

At the close of all the evidence, his Honor suggested that he would instruct the jury to answer the issue of title in favor of defendant if they believe the evidence. Upon this intimation, the plaintiff suffered a nonsuit and appealed.

Alex. Lassiter and Winston & Matthews for plaintiff.

E. R. Tyler, W. H. S. Burgwyn, and Stanley Winborne for defendant.

STACY, J. The property in dispute is a tract of land situate in Hertford County, and known as lot No. 1 in the J. H. Connor division of lands. The plaintiff offered in evidence an unbroken and connected chain of title for the said property, making out a *prima facie* case. The defendant then offered deeds and muniments of title tending to show, as he alleges, a superior right or paramount claim to the same property. But there is a conflict in the evidence as to whether the defendant's deeds cover the *locus in quo.* This was a matter which the jury alone could settle. The intimation of his Honor was, therefore, erroneous and prejudicial to the plaintiff's cause.

The other questions debated before us are not now presented for decision. The cause should have been submitted to the jury.

Reversed.

MARY JELSER ET AL. v. W. H. WHITE ET AL.

(Filed 8 March, 1922.)

1. Evidence—Declarations—Title.

Declarations of pedigree for the purpose of showing title to lands will be excluded as evidence unless it can fairly be assumed that the declarant is disinterested.

2. Same—Ante Litem Motam.

In order to introduce declarations as evidence of title to lands, it must affirmatively appear that the statements were made *ante litem motam,* or before the beginning of the controversy, and not alone at the time of bringing the suit, thus differing from an admission, which is the waiver of proof of a fact by a party to the action, as it may affect his cause.

3. Same—Obtained for Purposes of Suit.

Where declarations have been obtained for the purpose of establishing the title to the lands in controversy in behalf of a party claiming as heir at law of the deceased owner, and to be used in a contemplated action, they are inadmissible on the trial, whether made against the interest of the declarant or *ante litem motam,* or otherwise.

APPEAL by defendants from *Lyon, J.,* at the December Term, 1921, of CARTERET.

Proceeding for partition. The jury found that the plaintiffs and the defendants are tenants in common. Judgment for plaintiffs. Defendants appealed.

C. L. Abernethy and Guion & Guion for plaintiffs.
M. Leslie Davis, C. R. Wheatley, and J. F. Duncan for defendants.

ADAMS, J. The petitioners allege that they are the owners of a one-half undivided interest in the land in controversy as tenants in common with the defendants. The defendants deny this allegation, and plead sole seizin. At the trial the plaintiffs offered in evidence the will of Samuel Smith, in which the land described in the petition is devised to Thomas Huff and Henry Huff. It is admitted that the defendants have acquired the interest of Thomas, and the controversy turned primarily on the question whether the plaintiffs are the heirs of Henry. In addition to other evidence tending to show their descent from the latter, the plaintiffs introduced in evidence a written instrument purporting to be the affidavit of Haywood Huff. By exception duly entered the defendants challenge the competency of this evidence.

Helen Huff, one of the plaintiffs, had previously testified that she was lineally descended from Henry Huff. The affidavit represents Haywood Huff as declaring that his grandfather was Thomas Huff, one of the devisees of Samuel Smith; that Thomas and Henry, the other devisees, were brothers; and that Helen was descended from Henry. This evidence, then, presumably was of special weight in establishing the title of the plaintiffs. But we are of opinion that it was not competent for this purpose. In view of the circumstances under which the affidavit was obtained our conclusion is not affected, whether we consider the statement as a declaration concerning genealogy or pedigree, and therefore an exception to the rule which excludes hearsay evidence, or as a declaration against the interest of the declarant.

The evidence for the plaintiff tends to show that Haywood Huff, then 85 years old, was at the home for the aged and infirm in Carteret County; that a justice of the peace residing in Craven, at the instance of Helen Huff, one of the plaintiffs, twice visited the declarant for the purpose of obtaining a history of the Huff family to be used in this suit in behalf of the plaintiffs; and that a typewritten copy (submitted to the declarant) and not the original affidavit was produced at the trial and admitted in evidence. It appears, therefore, that the affidavit was procured after this controversy arose, to be used in the instant suit. One of the witnesses for the plaintiff said, "I was trying to perpetuate the family record of Helen Huff preparatory to bringing this suit, for that reason and no other reason." The affidavit was made 26 April, 1919, and this action was begun about three weeks afterward.

Elementary principles in the law of evidence exclude declarations as to pedigree unless it can fairly be assumed that the declarant is disinterested. Hence, it must affirmatively appear that the statement was made *ante litem motam;* and this expression is not restricted to the time of bringing suit, but is referred to the beginning of the controversy. *Rollins v. Wicker,* 154 N. C., 562; *Fleming v. Sexton,* 172 N. C., 256.

Nor, as we have suggested, is the affidavit competent as a declaration against the interest of Haywood Huff. Declarations against interest are entirely distinct from admissions; the latter amount to a waiver of proof and the former to evidence of the fact declared. It is not necessary to decide whether the character of the affidavit, as a declaration against interest, dispenses with the necessity of showing that it was made *ante litem motam* (22 C. J., 235), because as such declaration it is incompetent on another ground. The evidence clearly shows that the parties contemplated the subsequent use of the affidavit in prospective litigation as Haywood Huff's statement in behalf of designated parties. Declarations against interest must be spontaneous. They must be made prior to the time when their subsequent use as evidence may have been in contemplation. "If it appear that at the time of the making of the declaration the situation was such that its use in evidence might have been in the mind of the party, the declaration is inadmissible. . . . The rule—a presumption, as it is called in the cases—is an absolute rule of law, and the evidence, whether a declaration against interest or evidence of another sort, is ineffective in opposition to the rule." McKelvey on Ev., 317.

We therefore hold that the defendants are entitled to a new trial for error committed in the admission of the statement against their objection.

New trial.

J. W. SUTTON ET AL. v. DAVID SUTTON ET AL.

(Filed 8 March, 1922.)

1. **Injunction — Judgment — Pleadings—Issues of Fact—Questions for Jury—Trials.**

   Upon the hearing by the judge upon the question of continuing a restraining order to the hearing, the judge, upon proper findings, may dissolve the temporary order, but in doing so it is error for him to also determine an issue of fact, material to the rights of the parties, and which should be reserved for the jury to pass upon at the trial.

2. **Same—Deeds and Conveyances—Mental Capacity.**

   Upon the hearing by the judge of a motion to continue a preliminary restraining order to the hearing, the title to lands was made to depend, by the pleadings, upon the mental capacity of the grantor to make a valid deed to the *locus in quo*: *Held*, though the restraining order was properly dissolved under the facts appearing in this case, it was reversible error for the judge to incorporate in his order an adjudication of title, as this involved an issue as to the fact for the jury to determine at the trial.

APPEAL by plaintiffs from a judgment of *Horton, J.*, dissolving a temporary restraining order, rendered at chambers in Greenville, on 14 January, 1922, from PITT.

Julius Brown for plaintiffs.
F. G. James & Son and Albion Dunn for defendants.

ADAMS, J. Drusilla Crawford died seized in fee of a tract of land in Pitt County, leaving four children as her heirs at law, two of whom were Lydia Crawford and David Sutton. Thereafter, on 11 February, 1921, Lydia Crawford and her husband, J. B. Crawford, executed and delivered to David Sutton a deed conveying Lydia's interest in said land; and David Sutton and his wife executed a mortgage to Lydia to secure the purchase price. The plaintiffs filed their complaint, alleging that Lydia Crawford, at the time her deed was executed, was mentally incapacitated, and unable to comprehend the significance of her deed; and the defendants filed answers denying the plaintiff's allegation. A temporary order restraining David Sutton from conveying the land and J. B. Crawford from disposing of the note was issued and made returnable before Judge Horton. Affidavits were filed, and on the hearing at chambers his Honor heard the proof, found the facts, and dissolved the restraining order, and adjudged that the deed executed by J. B. Crawford and his wife to David Sutton conveyed Lydia's interest in the land, and that David Sutton is the owner of the interest conveyed.

Upon the facts set forth in the record his Honor properly dissolved the restraining order, and to this extent the judgment is affirmed; but his Honor should not have adjudged that David Sutton is the owner of the land in controversy, or that Lydia's deed conveyed her interest, because these questions must be disposed of in the final judgment, which will ultimately be determined by the verdict of the jury; and to this extent the judgment is modified.

The cost will be taxed against the appellees.

Modified and affirmed.

W. A. PASCHAL v. CHARLES D. JOHNSON ET AL., AND E. W. PRITCHETTE ET AL., TRUSTEES CONSOLIDATED SCHOOL DISTRICT.

(Filed 8 March, 1922.)

1. **School District—Consolidated Districts—Statutes—Taxation—Constitutional Law.**

   Under the provisions of C. S., 5469 *et seq.*, and ch. 179, sec. 1, of the Laws of 1921, the county board of education has a constitutional right to consolidate and establish local-tax districts and special-chartered districts "for school purposes," when the existing rates of taxation therefor are the same.

2. **Same—Elections—Approval of Voters.**

   Special school-tax districts, organized and exercising governmental functions in the administration of the school laws, are *quasi*-public corporations subject to the constitutional provisions in restraint of contracting debts for other than necessary purposes, except by the vote of the people of a given district, Const., Art. VII, sec. 7; and, *semble,* that where an existent tax and nontax district are thereunder consolidated, it would require the submission of the question to those living within the district thus formed, but outside of the district that has theretofore voted the tax. Const., Art. VII, sec. 7; C. S., 5530.

3. **Same—Bonds.**

Where there has been a valid consolidation of local-tax school districts, having an equal tax rate for the purpose, by proper proceedings under the statute the new district may then approve the question of an additional special tax, and where this has been done under the authority of a valid statute, and an issue of bonds properly approved by the voters, such bonds are constitutional and valid.

4. **Same—Corporations.**

Under our statutes, in general terms, relating to special school districts, apparently all of them within the State are incorporated and given powers and duties in reference to the issue and payment of bonds for school purposes, by the board of trustees, when approved by the voters of the particular district upon an election duly held for the purpose; the term board of trustees including the principal or governing body, by whatsoever name called, C. S., 360; Laws 1920, ch. 87; Laws 1921, chs. 244 and 133; and where two special school districts, having an equal rate of taxation, have been consolidated under the provisions of C. S., 5469 *et seq.*; Laws 1921, ch. 179, sec. 1; such district so consolidated may issue valid bonds for the purposes stated, when it has complied with the appropriate statutes.

5. **Constitutional Law—Municipal Corporations—Local Laws—Taxation—Bonds.**

Laws 1921, ch. 133, sec. 4, among other things incorporating existing local school districts for all purposes relating to the issuance or payment of bonds upon the approval of the voters of a district, is valid, independent of section 1 thereof, and not in contravention to our recent constitutional amendment, Art. II, sec. 29, prohibiting the incorporation of new school districts by special legislative enactment. *Trustees v. Trust Co.*, 181 N. C., 306, cited and distinguished.

APPEAL by plaintiff from *Devin, J.,* upon case agreed, 31 January, 1922, from ALAMANCE.

Civil action to restrain the issuance of bonds by the Altamahaw-Ossipee Consolidated School District. On the hearing it was made to appear, among other things, that the Altamahaw and Ossipee School districts were each separate school districts, and under a statute applicable had voted a special tax for schools of 30 cents on the $100 valuation of property, which had been levied, collected, and applied to the purpose indicated for several years prior to 1921. That on 4 April, 1921, by order of the board of education, the two districts were consolidated, and to be known as the Altamahaw-Ossipee School District. Trustees of the consolidated district were duly appointed and qualified. That on

30 June, 1921, on petition of said board of trustees, an election was ordered by the board of commissioners of Alamance County on the question whether said consolidated district should issue $50,000 of bonds and levying a tax to pay same in accord with statute applicable, and said election having been duly and regularly held, the measure was approved by a large majority of the duly qualified voters of the district, and thereupon the plaintiff, a citizen and taxpayer of the district, instituted the present action to restrain the issue of said bonds, as stated. Upon these and other pertinent facts presented, the court entered judgment as follows:

"This case coming on to be heard before me this day, and being heard upon the agreed statement of facts, and argument of counsel for both plaintiff and defendants, and the court being of the opinion:

"1. That the county board of education of Alamance County had authority to create the Altamahaw-Ossipee Consolidated School District by virtue of C. S., 5473, as amended by ch. 179 of Public Laws of 1921.

"2. That said Altamahaw-Ossipee Consolidated School District so created by the county board of education of Alamance County is a body corporate and politic by virtue of ch. 308, Public Laws of 1919. See, also, ch. 133, Public Laws of 1921.

"3. That said school district is authorized and empowered, by virtue of ch. 87, Public Laws of 1920, special session, to issue bonds.

"4. That the provisions of law necessary to be complied with prior to the issuance of bonds under said act have all been complied with by said Altamahaw-Ossipee Consolidated School District, and that the resolution of the trustees of said school district, passed 23 January, 1922, and authorizing the issuance of $50,000 bonds of said district, is a valid exercise of an existing power, and that said trustees should be permitted to proceed with the issuance and sale of said bonds.

"5. That after the issuance and sale of said bonds there will be full power and authority in and it will be the duty of the board of commissioners of Alamance County to levy annually a special tax *ad valorem* on all taxable property in said school district for the purpose of paying and sufficient to pay the principal and interest of said bonds.

"It is, therefore, upon motion of counsel for defendants, considered, ordered, and adjudged that the petition of plaintiff praying for an injunction to restrain the issuance and sale of said bonds be and the same is hereby dismissed.

"Plaintiff will pay the cost of this action, to be taxed by the clerk."

Plaintiff excepted, and appealed.

E. S. W. Dameron and H. J. Rhodes for plaintiff.
Coulter & Cooper for defendants, School Trustees.

HOKE, J. In our opinion there is no maintainable objection to the validity of this proposed bond issue. Under C. S., ch. 95, art. 10, and ch. 179, sec. 1, Laws of 1921, the county boards of education are, under specified conditions, expressly authorized to consolidate "local-tax districts and special-chartered districts," both where they have the same or different tax rates, and also to consolidate tax districts with nonlocal-tax districts, etc. The statute contains provisions further that in case of consolidation where the tax rate differs, the rate may be made uniform by the county commissioners on the recommendation of the board of education, and with the further proviso that no taxpayer of a consolidated district shall be required to pay a larger special tax rate than that originally voted by his district. In the case presented here, both of these districts having heretofore voted the same special tax rate for school purposes, there is no constitutional question involved by an increase of the tax rate of either. As to instances where the tax rate may differ, as where there is an attempt to combine a special-tax district with a nonspecial-tax rate territory—the statutes present greater difficulty for these special school-tax districts—organized and exercising governmental functions in the administration of the school laws, have been held *quasi*-public corporations, subject to the constitutional provisions in restraint of contracting debts for other than necessary expenses, except by vote of the people of a given district. *Smith v. School Trustees,* 141 N. C., 143; Constitution, Art. VII, sec. 7. Where such conditions are presented and, owing to the constitutional objection suggested, it would seem that in order to combine a special-tax district with nonspecial-tax territory the question should be considered and dealt with as an enlargement of districts and coming under C. S., 5530, whereby the outside territory is allowed to vote separately on the proposed tax. The question, however, does not arise on the present record, and is only referred to in order to exclude the inference that in making our present decision we are approving *in toto* the provisions of chapter 179, above referred to. The two districts, therefore, having been properly combined into one, and the voters of the consolidated district having approved the bond issue by a pronounced majority, in addition to the principle announced in *Smith v. School Trustees, supra,* there is ample and express statutory provisions incorporating the inhabitants and affording further authority, if any were required, for the measure as contemplated. In ch. 308, Laws of 1919, it is provided, among other things, that the inhabitants of every road, school, or other district in or on behalf of which bonds or other evidence of debt are authorized by law to be issued, etc., etc., shall for all purposes relating to the issue of such bonds or other evidence of debt, constitute a body politic and corporate, and its governing authorities may adopt a seal and, except as otherwise provided by law, may have all the powers and perform all the duties of an incorporation in reference to the issue or payment of such bonds or other indebtedness, etc. Such statute appearing is C. S., 360. And in ch. 87, Public Laws, special session, 1920, it is enacted that the board of trustees of any school district in this State is authorized to issue bonds for special school purposes where the measure is properly approved by the voters at an election held as the law provides. In section 9 of this statute the term school district is defined to include every graded school district, high school district, township, or other school district in this State, and the term "board of trustees" shall include the principal administrative or governing body of a school district by whatever name called. And that there may be no uncertainty to arise from the use of these broad and inclusive terms, ch. 224, Laws of 1921, superadds to "governing body" the words "or school committee," thus extending the provisions of the act to these school districts, which were then in charge of local school agents under the direction of the county board of education. Again, in Laws 1921, ch. 133, sec. 4, there is further provisions made that for all purposes relating to the issuance or payment of bonds by or on behalf of any school district in this State, the inhabitants are constituted a body politic and corporate by the name and style by which such school district is known, and said body politic is hereby authorized to sue and be sued, etc. It is suggested that section 1 of this last statute has, in certain instances, been disapproved in its application to certain school districts which the General Assembly has attempted to create by special enactment contrary to one of the recent constitutional amendments contained in Art. II, sec. 29, prohibiting the incorporation of new school districts by special enactment, as shown in *Trustees v. Trust Co.,* 181 N. C., 306; *Sechrist v. Comrs.,* 181 N. C., 511. But if it be conceded that every instance having significance coming under this section 1 is within the principle of the decision referred to, that, as appellee contends, would not affect the force and operation of section 4 just cited, the latter being on a subject distinct and severable from the provisions of section 1. *Keith v. Lockhart,* 171 N. C., 451-459; Black on Constitutional Law, sec. .... There is nothing in *Woosley v. Comrs.,* 182 N. C., 429, that in any way militates against our disposition of the present appeal. In that case the Court held that "under the law there prevailing and applicable, C. S., 5469-5473, the county boards of education were without authority to superimpose a high school district on existing districts not consolidated or abolished, but still functioning for other than high school purposes, and that the said section referred to the establishment or change of districts in the sense of territorial divisions or geographical regions." In the present case, and under the Laws of 1879, these boards, as we have seen, are authorized to combine special-tax districts, and these consolidated districts are authorized to vote special tax rates for schools on the entire district in accordance with law. And in instances like the present, where the districts have already voted the same tax rate, the consolidation making no increase of the prevailing tax and authorizing none except where the voters impose it upon themselves, such a statute is, in our opinion, clearly within the legislative power, and under its provisions the proposed bond issue, having been fully approved by the voters, the same will constitute a valid obligation of the consolidated district. The court below has correctly ruled that the restraining order should be dissolved and action dismissed.

Affirmed.

JAMES A. DUGUID v. J. C. RASBERRY AND G. T. GARDNER.

(Filed 8 March, 1922.)

1. **Evidence—Trusts—Contracts—Questions for Jury—Trials.**

The purchaser at a public sale assigned his bid to a real estate company, which paid the purchase price under a written agreement that the land be sold, the purchase price repaid to it, with interest and expenses, and the profits divided in certain proportions, between itself and the assignor of the bid, and the land was thereafter sold at a profit: *Held*, the contract was one in the nature of a trust, and under its terms and the evidence in this case, the questions as to whether the real estate company should have sold the property itself and not have paid another company an apparently unreasonable price for such services, or whether, in fact, it had so paid it, these questions and the reasonableness of the charge, or the amount recoverable, were matters of fact for the jury to determine, with the burden of proof on the defendant, the real estate company.

2. **Instructions—General Terms—Requests—Appeal and Error.**

Where the instructions of the trial judge in general terms correctly cover the evidence in the case, they will not be considered as erroneous as not being more specific in the absence of a proper special request for instructions thereon.

3. **Evidence—Motions—Court's Discretion—Appeal and Error—Weight of Evidence.**

A motion to set aside a verdict as being against the weight of the evidence is addressed to the discretion of the trial judge, and is not reviewable on appeal.

APPEAL by defendant from *Lyon, J.*, at the November Term, 1921, of CRAVEN.

The plaintiff purchased at public sale a valuable store-house and lot in the town of Washington, N. C., for $28,750, and transferred his bid to the defendant under a written contract in which the defendants paid the purchase price and agreed that when the property was sold they were to be repaid the purchase price with interest and expenses, and they were to have two-thirds of the profits and plaintiff was to have the other one-third thereof.

The defendants sold the property for $43,168 on time, and filed an account, which included, among other things, an item of $4,316, which they claim was a commission they had paid to an auction company for selling the property. The plaintiff did not dispute any of the items of the account, except the one for commission, claiming that the defendants should have sold the property themselves, as they were real estate dealers, and should not have paid any such sum as $4,316 for selling the same, as they were getting two-thirds of the profits and all actual expenses.

The court submitted an issue to the jury as to what amount was a reasonable one for selling the property, and instructed them, substantially, that if it was not intended or contemplated by the parties that the defendants should employ an auction company to sell the property and it was an unnecessary and unreasonable expense to incur, under the circumstances, and that instead, defendants, being real estate dealers, should have sold the property themselves, then the jury should answer the issue "Nothing." Further, that if the amount paid was unreasonable, the jury should say what was a reasonable amount, and allow only that amount to the defendants for making the sale, if they found that the defendants had employed the auctioneers and paid the money, and if the whole amount was reasonable the jury should allow that amount if it had been paid by the defendants, and it was necessary, or reasonable, to employ an auctioneer to make the sale. That the jury could allow the whole amount claimed, or such part as was reasonable and had been paid.

The jury answered the issue "Nothing."

Judgment was entered on the verdict, and defendants appealed.

D. L. Ward and E. M. Green for plaintiff.
Moore & Dunn for defendants.

WALKER, J. There would seem to be nothing more than a question of fact in this case. The burden was upon the defendants to show that the amount was not only a reasonable one for services rendered by the auction company, but that they had in fact paid it, and the evidence upon these two questions was of a most unsatisfactory character. On the bare facts of the case the sum charged in the account against the plaintiff and credited to the defendants, that is, $4,316, would appear to be far beyond what such a service, if rendered, was reasonably worth, and the evidence as to the fact of the payment by the defendants to the auction company was not such as should have been offered by one occupying a position somewhat similar to that of a fiduciary liable to account for money received and disbursed by him. There was no receipt of the auction company introduced in evidence by the defendants. The witness merely stated that the money had been paid, but without showing the receipt for the same, or calling as witnesses the parties to whom it was paid. The jury either discredited this evidence as to the payment, or decided that the defendants had not produced satisfactory evidence to show what was a reasonable amount to be paid for the service rendered, nor that what was paid, if anything, was reasonable. The contract did not fix the amount, and, in the absence of a more definite agreement between the parties as to the same, the defendants were entitled only to a credit for what the services of the auctioneer were reasonably worth under all the facts and circumstances of the case. 13 Corpus Juris., 791, sec. 1017; *Nordyke v. Kehlor*, 78 A. S. Rep., 600. This question was fairly and fully submitted to the jury by the court in every aspect of it, and the charge was exceedingly fair to the defendants, if not more reasonable to them than they should have expected. It was a question of fact, and the jury, upon the evidence, have decided it against the contention of the appellants.

The court properly overruled the motion for a nonsuit. There were no prayers for special instructions. If the defendants had desired other instructions than those given, which, though general, covered the case, they should have asked for more specific instructions in order to present any view which they thought should be more particularly stated. *Simmons v. Davenport,* 140 N. C., 407, and cases cited in Anno. Ed. But we consider that the jury understood the real merits of the case, and reached the proper conclusion upon the issue and evidence.

If the verdict was against the weight of the evidence, the defendants' remedy was an application to the court to set it aside, but the decision upon such a matter is not reviewable here. But, if it could be revised by us, we are inclined strongly to the opinion that, upon the evidence, the conclusion of the jury was a correct one.

No error.

MASCOT STOVE AND MANUFACTURING COMPANY, INC., AND FIRESTONE TIRE AND RUBBER COMPANY, INC., IN BEHALF OF THEMSELVES AND ALL OTHER CREDITORS OF L. C. TURNAGE, v. L. C. TURNAGE, TRADING AS PITT HARDWARE COMPANY, AND W. J. HART, INTERVENER.

(Filed 8 March, 1922.)

1. **Receivers — Clerk Hire — Preferences — Statutes— Creditors' Suit— Deeds and Conveyances—Assignment for Creditors.**

   No preference is given either at common law or in equity, or by statute, for clerk hire in a store for services rendered prior to the appointment of a receiver for the owner, on application of creditors, C. S., 859, 860, 1113 (6), and no permissible interpretation in favor of such a preference can be derived by analogy to our statutes applying to a voluntary assignment for the benefit of creditors. C. S., 1609, 1618, or the other sections of chapter 28.

2. **Statutes—Interpretation—Intent—Literal Construction.**

   A statute is interpreted to ascertain and enforce its intent and meaning from its language, and where it is plain, free from ambiguity, and expresses a single, definite, and sensible meaning, that meaning is conclusively presumed to be the one intended, and a literal interpretation is given it by the courts.

APPEAL by intervener from *Lyon, J.*, at the September Term, 1921, of PITT.

This is a civil action commenced in the Superior Court of Pitt County by the Mascot Stove Manufacturing Company against L. C. Turnage, trading as the Pitt Hardware Company. Upon the complaint, R. T. Cox was appointed receiver of L. C. Turnage, who, as an individual, was doing a hardware business in the town of Ayden, N. C., under the firm name or trade name of the Pitt Hardware Company. At the time a receiver was appointed, and for several months prior thereto, Wilbur J. Hart was working with the said Pitt Hardware Company as a clerk in the stove store. Upon the appointment of the receiver, W. J. Hart, by order of Hon. W. A. Devin, the judge then holding the courts of the district, at the April Term, 1921, of the Superior Court of Pitt County, was allowed to intervene and become a party, and by the order was allowed to file his claim with the receiver for a preference for three months labor performed just prior to the appointment of the receiver. The said Wilbur J. Hart filed his claim for three months services at $100 per month just prior to the appointment of the receiver, and asked in said claim that the same be allowed as a preferred claim, and that it be paid in full. The receiver disallowed said claim for a preference, and allowed it as a general creditor's claim, from which ruling of the receiver W. J. Hart, intervener, excepted and appealed to the Superior Court, and the same came on to be heard at the November Term, 1921, of the Superior Court of Pitt County, and the ruling of the receiver was sustained, disallowing the intervener's claim for a preference, to which order and judgment Wilbur J. Hart excepted and appealed.

P. R. Hines and Julius Brown for intervener and appellant.
Albion Dunn and Lewis G. Cooper for R. T. Cox, receiver.

WALKER, J. The facts in this appeal are very few, and, as we think, very simple. The intervener, W. J. Hart, concedes that he has no lien or preference in the distribution of the assets of the defendant, at common law, or in equity, and bases his claim to one upon the provisions of C. S., 1618, which is a part of chapter 28, concerning voluntary assignments for the benefit of creditors, section 1609 providing: "Upon the execution of any voluntary deed of trust or deed of assignment for the benefit of creditors, all debts of the maker thereof shall become due and payable at once, and no such deed of trust or deed of assignment shall contain any preferences of one creditor over another, except as hereinafter stated." Section 1618 is as follows: "The trustee, after paying the necessary costs of the administration of the trust, shall pay as speedily as possible (1) all debts which are a lien upon any of the trust property in his hands, to the extent of the net proceeds of the property upon which such debt is a lien; (2) wages due to workmen, clerks, traveling or city salesmen, or servants, which have been earned within three months before registration of said deed of trust or deed of assignment, and other debts 'equally ratable.'" Counsel for intervener relies on C. S., 1113 (6) and 860 as to receivers. But the intervener presents a case of first impression and none of the sections of the statute warrant, nor do all of them combined warrant, the inference he draws from them, that an individual's assignment for the benefit of his creditors bears such a close resemblance to the remedy for the appointment of a receiver, in the cases specified in the statute (C. S., 859 and 860), as to justify us in reading into section 1618, as to assignments, any words that would confer a preference or a lien in favor of the intervener as a clerk in the debtor's store or place of business. Nor is the contention sound, or permissible, that the office and duties of an assignee, under a general assignment for the benefit of creditors, and those of a receiver are even substantially alike. One is appointed by the voluntary act of a debtor, while the other is appointed against the consent of the debtor. The Legislature no doubt thought that, when the act of appointment was purely voluntary, the debtor should be just before he is generous, and therefore required him to prefer, at least as to a portion of their claim upon him, workmen, clerks, traveling salesmen and servants, but it is plain that no such exception in their favor was intended in the case of a receivership, or could have been contemplated. We are not permitted to change the phraseology of a statute, and certainly not its meaning, so as to include a case not mentioned in it. This would be to amend the statute, which would be legislation and not construction. The object of all interpretation or construction is to ascertain the meaning and intention of the Legislature, to the end that the same may be enforced, which must be sought for first of all in the language of the statute itself, for it must be presumed that the means employed by the Legislature to express its will are adequate to the purpose, and do express that will correctly. If the language of the statute is plain and free from ambiguity, and expresses a single, definite, and sensible meaning, that meaning is conclusively presumed to be the one which the Legislature intended to convey, or, in other words, the statute must then be interpreted literally. This was said in *Abernethy v. Comrs.,* 169 N. C., 631.

The decision of the learned judge was clearly right, and there was no error, as alleged by the appellant.

Affirmed.

NANNIE ANDERSON v. T. M. ANDERSON.

(Filed 15 March, 1922.)

1. **Husband and Wife—Domestic Relations—Subsistence of Wife—Statutes—Court's Discretion.**

The amount allowed for the reasonable subsistence, costs, and attorney's fees to the wife in her proceedings against her husband under the provisions of C. S., 1667, is within the sound discretion of the judge hearing the same and having jurisdiction thereof.

2. **Same—Abuse of Court's Discretion.**

The restrictions imposed upon the judge in making an allowance to the wife for alimony in suits for divorce, C. S., 1665, do not apply to the exercise of his sound discretion in proceeding under the provisions of C. S., 1667, by the wife to obtain a reasonable subsistence, costs, and counsel fees from her husband.

3. **Same—Admission—Findings of Fact.**

Held, from the admissions of the husband of his acts of adultery, his abandonment of his wife, and from the facts found by the judge in these proceedings of the wife for a reasonable subsistence, costs, and counsel fees, under the provisions of C. S., 1667, the amount allowed by the judge will not be held as unreasonable on appeal, or as exceeding the sound discretion given him by the statute.

4. **Husband and Wife—Domestic Relations—Subsistence of Wife—Orders —Judgments—Modification of Orders—Statutes.**

Where, within the exercise of his sound discretion, the Superior Court judge, having jurisdiction, has allowed the wife a reasonable subsistence. attorney's fees, etc., in her proceedings under the provisions of C. S.. 1667, the order of allowance may be thereafter modified or vacated as the statute provides, upon application to the proper jurisdiction for the circumstances to be inquired into and the merits of the case determined.

5. **Husband and Wife—Domestic Relations—Subsistence of Wife—Alimony—Divorce—Statutes.**

While as to technical alimony the ordinary rule is that the title to the property designated, to enforce the order of the court remains in the husband, and it will revert to him upon reconciliation with or the death of the wife, this rule does not apply to an allowance for the reasonable support of the wife, etc., under the provisions of C. S., 1667; and the words used in the beginning of this section, "alimony without support." will not be construed to give the word "reasonable support" for the wife, the meaning of technical alimony.

6. **Same—Order Securing Alimony.**

Technical alimony, is the allowance made to the wife in suits for divorce, and may be secured by a proportionate part of the husband's estate judicially declared; or if he have no estate, it may be "made a personal charge against him," and it materially differs from a reasonable subsistence, etc., allowable in the wife's proceedings under the provisions of C. S., 1667, where a divorce is not contemplated, and where, in accordance with the statute, the order allowing her such subsistence may secure the same out of the husband's estate.

7. **Same—Estate of Husband.**

The husband's "estate," from which the court may secure its order allowing a reasonable subsistence, etc., to the wife in her proceedings under the provisions of C. S., 1667, includes within its meaning income from permanent property, tangible or intangible, or from the husband's earnings.

8. **Marriage—Domestic Relations—Contracts—Debts—Constitutional Law —Exemptions—Debtor and Creditor.**

The marriage relation, spoken of as a civil contract, is more than an ordinary business contract in that the marriage confers certain other privileges and imposes certain other duties upon the parties as between themselves and in their relation to society, among them being the husband's duty to protect and provide for his wife; and this is more than a debt, in its ordinary sense, and not merely such an one as exists in the ordinary acceptation of the word, or within the contemplation of our Constitution, Art. X, secs. 1 and 2, allowing to the creditor his homestead or personal property exemptions therefrom.

9. **Same—Trusts.**

Held, under the facts and circumstances of these proceedings of the wife, under the provisions of C. S., 1667, for a reasonable support, etc., an order was proper that the husband convey certain of his lands in trust to secure the allowance made to the wife, or in default thereof, the lands should so be held by the trustee designated.

10. **Husband and Wife — Wife's Subsistence— Estates—Contingencies—Defeasible Fee—Marriage—Domestic Relations.**

Where the judge, in the proceedings of the wife for an allowance of a reasonable subsistence, has impressed a trust upon the husband's land for the enforcement of the decree, the fact that in a part of the land he has only a defeasible fee, cannot prejudice him, and his exception on that ground cannot be sustained.

APPEAL by defendant from *Allen, J.*, at chambers, 30 November, 1922, from NASH.

Application by plaintiff for an allowance for subsistence, expenses, and counsel fees, as provided in C. S., 1667, as amended by ch. 123, Public Laws 1921.

The plaintiff and the defendant were married on 10 June, 1919, and lived together until 14 June, 1921, when plaintiff alleged the defendant abandoned her and withdrew support. His Honor held that in the absence of issuable facts the only question was the amount of such subsistence, expenses, and fees; and after hearing the evidence made an allowance to the plaintiff of $100 a month, and $400 for expenses and counsel fees. The following additional decree is incorporated in the judgment: "It is further ordered and decreed that this judgment to the extent of the amount herein decreed as an allowance, and to the extent of the monthly payments herein decreed during the life of this decree, shall constitute a lien on all the real and personal property of the defendant, and the said defendant is hereby ordered and directed to execute a deed of trust, conveying all his interest in real estate in Nash and Edgecombe counties to Leon T. Vaughan, trustee for plaintiff, to secure the performance of this decree, and in default of the execution of said deed of trust within ten days from this date, 30 November, 1921, then this decree shall operate as such conveyance to said Leon T. Vaughan, trustee, with the power of sale in default of any payment or part thereof, as herein ordered. In addition, in case of ten days default on any payment, let notice be issued to said defendant to show cause before the presiding judge of the Second Judicial District why attachment for contempt should not issue to enforce payment of same." The defendant excepted, and appealed.

Finch & Vaughan and McLean, Varser, McLean & Stacy for plaintiff.
G. M. T. Fountain & Son and F. S. Spruill for defendant.

ADAMS, J. The defendant admits, not only his moral default in abandoning his wife, but as well his legal liability to make suitable provision for her maintenance; but he insists that the judgment of the court contravenes established principles of law, and for this reason cannot be enforced. Against the validity of the judgment he interposes four objections:

1. The payments decreed are unwarranted and excessive.

2. Subjecting to a lien the defendant's interest in land is without warrant of law.

3. The judgment violates Art. X, sec. 2, of the Constitution.

4. The defendant has only a defeasible fee in the lands known as the Dickens place.

As to the first objection the defendant admits that ordinarily the amount allowed for subsistence under section 1667 rests in the sound discretion of the court. *Cram v. Cram,* 116 N. C., 288; *Bradford v. Reed,* 125 N. C., 311; *Matthews v. Fry,* 143 N. C., 384. But he argues that in view of the limitation prescribed in section 1665 and of the actual value of the defendant's property the amount of the payments imposed constitutes an abuse of the court's discretion. It should be noted that the limitation to one-third of the net annual income from the estate (section 1665) applies when the court adjudges the husband and the wife divorced from bed and board, but not when the wife institutes the proper proceeding for alimony *pendente lite* under section 1666 or for a reasonable subsistence under section 1667. The Legislature has preserved this distinction through the entire statutory history of the law of divorce and alimony in this State, beginning with the act of 1814, and has evidently intended to empower the courts to make in each case such decree as the peculiar circumstances might demand. His Honor, therefore, was not required in this proceeding to confine the subsistence to one-third part of the defendant's net annual income. Nor can we conclude that in any respect there was abuse of discretion. The plaintiff testified at the hearing; the defendant did not testify, but introduced his father. Besides the desertion of his wife, the defendant admitted his adultery, and in addition, that the only question for his Honor was the subsistence to be allowed. His Honor inquired into the defendant's financial condition and found the facts. Section 1667 provides that the order of allowance may be modified or vacated; but the application must be made in the proper jurisdiction so that the circumstances may be inquired into and the merits of the case determined. The first objection, we conclude, cannot be sustained.

Concerning the second, the defendant contends that the court, while in proper instances it may sequester a part of the husband's property for alimony, has no power to deprive the husband of the title and possession of his real estate. This contention is based on the legal proposition that where alimony is allotted in specific property the title to such property remains in the husband, and will revert to him upon reconciliation or the death of the wife; and that the remedy for noncompliance with the order of the court is attachment for contempt. As to the suggested remedy, the answer is this: the object of the judgment is subsistence for the wife, not the punishment of the husband. After his property had been dissipated or placed beyond the reach of the wife, his imprisonment, to say the least, would be but ill requital for her pecuniary loss. And as to the other contention, we must keep in mind the distinction between alimony and subsistence. It is true that alimony is broadly defined as an allowance to the wife out of the husband's estate during the period of their separation, but technically alimony is allowed during the pendency of an action for divorce, or after the divorce is adjudged. 1 R. C. L., 865; 19 C. J., 202. It may be a proportion of the husband's estate which is judicially allowed and allotted to the wife, or, if he have no estate, it may be a personal charge upon the husband. *Taylor v. Taylor,* 93 N. C., 420; *Miller v. Miller,* 75 N. C., 71; C. S., 1665, 1666. But section 1667 applies when divorce may not be in the contemplation of the wife. The words "alimony without divorce" at the beginning of the section do not convert the "reasonable subsistence" therein provided for into technical alimony. *Cram v. Cram,* 116 N. C., 292. This section provides that the wife may apply to have such subsistence paid or secured, and that the judge may secure so much of the husband's estate as may be proper for the benefit of the wife. In *Crews v. Crews,* 175 N. C., 173, cited by the defendant, the definition of the word "estate" is not restricted to "income," but is enlarged so as to embrace income whether arising from permanent property or earnings, for there it is clearly said that alimony could be assigned from both tangible and intangible property (*Reid v. Neal,* 182 N. C., 199); and in *White v. White,* 179 N. C., 592, it was held that the court may declare alimony a lien upon the husband's lands, even in the absence of notice to him that his wife had instituted a proceeding for that purpose. Conforming to these decisions, the judgment does not deprive the defendant of the title or possession of his property; but in accordance with the express terms of the statute undertakes to secure for the wife the reasonable subsistence and expenses to which his Honor finds she is entitled.

The defendant contends that as against the amount allowed for the plaintiff's subsistence and expenses he is entitled to his homestead or personal property exemption. Waiving the plaintiff's contention that the question is not properly presented upon the record, we think that the defendant's objection is without merit. The defendant's obligation to support the plaintiff during the existence of the marital relation is not a "debt" within the meaning of Art. X, secs. 1 and 2, of the Constitution. It is true that marriage is usually regarded as a civil contract; but in every contract of marriage there are elements which do not enter into an ordinary contract. In its binding force marriage is indissoluble, even by consent of the parties, and creates, moreover, a peculiar status, which, attending them through life, both confers privileges and enjoins duties. Among the latter is the husband's duty to protect and to provide for his wife. This duty is not a mere incident of contract, but it arises out of the very nature and purpose of the marriage relation; and this relation civilized mankind regard as the only stable foundation of our social and civil institutions. Hence, both law and society demand that the marriage relation be recognized, respected, and maintained, and that the husband's duty to support his wife and their offspring be awarded higher sanction than the strait contractual obligation to pay value for a yoke of oxen or a piece of land. The defendant, therefore, cannot escape the performance of his duty to support the plaintiff on the ground that he sustains toward her the relation of a mere debtor. Rodgers on Domestic Relations, sec. 2 *et seq.*

We are not able to see how the last objection can benefit the defendant. If his estate should be sold as a determinable fee, how the judgment rendered would cause the defendant to suffer loss by reason of such sale is not easily perceived.

Upon the record we find no error, and his Honor's judgment is therefore affirmed. Let this be certified.

Affirmed.

U. S. MORRIS ET AL., TRADING AS U. S. MORRIS AND BROTHERS, v. AMERICAN RAILWAY EXPRESS COMPANY.

(Filed 15 March, 1922.)

1. **Carriers of Goods—Express Companies—Failure to Deliver—Negligence—Evidence—Prima Facie Case—Nonsuit—Instructions.**

Where an express company receives as a common carrier a package containing money to be transported and delivered to a firm of which the sender is a member, evidence that the carrier failed to deliver it is *prima facie* evidence of its negligence, carrying the case to the jury for its determination in the sender's action, and a motion as of nonsuit, or instruction in the defendant's favor thereon, is properly denied.

2. **Same—Fraud—Constructive Fraud.**

While a carrier may avoid liability for accepting a package by reason of the shipper's misrepresentation to its agent as to its kind or quality, upon the principle of actual or constructive fraud in the making of the contract, if actual fraud there should ordinarily be a false statement of some essential fact, knowingly made and reasonably relied on by the agent of the carrier, as an inducement to the contract of carriage; or, if constructive fraud, the silence of the consignor and the circumstances of the transaction must in fact and effect be the equivalent of a fraudulent misrepresentation.

3. Same—Misrepresentations of Shipper—Mistake of Agent—Damages.

The railroad agent received from the consignor a box containing money change, and there was evidence tending to show that the consignor told this agent it contained money change, but that the agent understood him to say "chains" or "automobile chains," and as such this agent delivered the package to the express agent when he returned, who sent it as "automobile chains," though the box was too small for a shipment of that character, which the express agent himself doubted at the time. In either event the express rate was the same, and it appearing that the package was never delivered: *Held*, sufficient to support a verdict of the jury awarding damages to the plaintiff, to the extent of the value given, and upon the evidence sustaining it.

4. Same—Exceptions—Proximate Cause—Burden of Proof.

Except for the act of God, the common enemy, or default attributable to the shipper, a common carrier is held liable as insurer of goods it accepts for transportation and delivery, and where the carrier relies on an exception to the general rule it must show that the exception was the proximate cause of the injury; and where it is shown that an express company has accepted goods for shipment and has failed to deliver them, according to the contract of carriage, a *prima facie* case of its negligence is established, and a motion as of nonsuit, or a prayer directing a verdict upon the evidence, is properly refused.

5. Carriers — Express Companies—Freight Receipts—Money—Bullion—Negligence of Carrier—Damages.

A clause of an express receipt for an interstate shipment, the form of which has been approved by the Interstate Commerce Commission, excusing the carrier from liability when the package contained money, bullion, when it is not so stated in the receipt, except in case of loss due to carrier's negligence, does not by its express terms include loss proximately caused by the carrier or its agent when the evidence and verdict have established a loss due to such negligence.

APPEAL by defendant from *Calvert, J.*, at the November Term, 1921, of BERTIE.

Among other evidence, there was testimony tending to show that plaintiffs are surviving partners of the firm of U. S. Morris & Brothers, at Lewiston, Bertie County. The firm was composed of U. S. Morris, W. F. Morris, and N. S. Morris. N. S. Morris lived at Sparrows Point, Md. The others lived at Lewiston (Woodville), N. C. In the fall of 1918 small change was scarce with the firm, and they wrote to N. S. Morris at Sparrows Point to ship them $150 in small change, nickels, dimes, quarters, and halves. N. S. Morris took that amount and with the help of B. F. King packed it in a wooden box about eight inches square, securely nailed the top on it, wrapped it in strong manilla paper, and tied it with heavy cord. The package was taken by N. S. Morris and D. C. King to the office of the defendant at Sparrows Point, Md., for shipment. They found the office closed. The Pennsylvania Railroad carries express from Sparrows Point for defendant.

Morris and King delivered the package, in good order and unbroken, to one Van Horn, ticket agent for the said railroad, paid him the charges of 89 cents, and gave him the valuation of one hundred and fifty dollars, with directions to have it shipped by express. King swears that he told Van Horn the box contained change. Van Horn swears he understood King to say it contained chains. That is what he swore in an affidavit made just after the shipment. On the trial he swore that King told him the box contained "automobile chains."

Van Horn took the box and cared for it in his ticket office. Next morning he found it just where he had left it, not disturbed and unbroken. He took it into the express office and delivered it to Taylor, the agent of the defendant express company. They both swear, in depositions taken, that Van Horn told Taylor the box contained "automobile chains," and was to be valued at $150.

Taylor filled out the express receipt; did not indicate on it that the box contained chains or automobile chains; placed a valuation on it of $150; collected express charges based on that valuation, and signed the receipt and handed it to Van Horn. N. S. Morris got the receipt and sent it to his firm at Lewiston, N. C. The package never was carried to Lewiston and never was delivered to the plaintiffs.

On issues submitted, there was verdict that the shipment was received by defendant as common carrier, and lost by defendant's negligence; that the damages sustained by reason of such negligence was one hundred and fifty dollars and interest, etc. Judgment on the verdict for plaintiff, and defendant excepted and appealed.

Winston & Matthews for plaintiff.
Gillam & Davenport for defendant.

HOKE, J. The facts in evidence tended to show that in December, 1918, a package containing $150 in money change, belonging to plaintiffs, was received at Sparrows Point, Md., for shipment to Woodville, N. C., by defendant as common carrier, and that same was lost in the course of shipment by negligence of defendant company.

In acceptance of these facts, liability of defendant for the amount has been established by the verdict, and we find no reason presented for disturbing the results of the trial. Defendant excepts, first, for the refusal of its motion to nonsuit, but on the record there being no dispute as to the receipt of package for shipment as common carrier, and an admitted failure to deliver, this of itself is sufficient to constitute a *prima facie* case, carrying the question of liability to the jury. *Cotton Oil Co. v. R. R., ante,* 95; *White v. Hines,* 182 N. C., 288; *Trading Co. v. R. R.,* 178 N. C., 175; *Mewborn v. R. R.,* 170 N. C., 205; *Brinson v. R. R.,* 169 N. C., 425; *Meredith v. R. R.,* 137 N. C., 478.

And these and other authorities of similar import are controlling as against a second exception by appellant for refusing an instruction "that on the entire evidence, if believed, there should be a verdict for defendant."

It is further insisted for defendant that no recovery should be allowed because of evidence to the effect that this being a money package, the station agent, acting in this matter for plaintiffs, said to express agent at time of shipment that the package contained automobile chains of the value of $150, and that on such statement same was shipped as merchandise.

The position is presented in several prayers for instructions, all closing with the proposition that on the facts as suggested, "if the package was lost or stolen in transit, the plaintiffs could not recover." There are well considered decisions to the effect that a defendant may be relieved of the contract of carriage and the exigent liabilities incident to it by reason of misrepresentations as to the value and nature of the goods. A learned discussion of the principle and a proper application of it appears in a recent case of *United States v. A. C. L. R. R. Co.,* reported in 206 Fed., 190-205, the opinion being by our former associate, the Hon. H. G. Connor, now Federal judge of Eastern District of North Carolina, and in which many of the pertinent authorities are cited and commented on. The cases referred to, and others of like kind, proceed upon the principle of active or constructive fraud in the making of the contract. And in the application of such a principle it is the accepted position that an order to the avoidance of a contract for actual fraud there should ordinarily be a false statement of some essential fact, knowingly made and reasonably relied upon by the other party as an inducement to the agreement. *May v. Loomis,* 140 N. C., 350; *Lunn v. Shermer,* 93 N. C., 164.

And in case of constructive fraud, the silence of the party claimant, together with the facts and circumstances of the transaction, must in fact and effect be the equivalent of such a misrepresentation. By way of illustration, an instance of the latter position is given in the Federal case above referred to, where recovery was denied on the ground in part that valuable jewels were shipped as ordinary mail, and for ordinary postage with nothing that in any way disclosed to the carrier the value and nature of the package. And so, in *Orange City Bank v. Brown,* 9 Wendell, 85, wherein it appeared that a large amount of money, over $11,000, was placed in a trunk and checked as ordinary baggage.

But on the record there is no such principle permissible as a conclusion of law, from the facts in evidence, and that is the only way that defendant's prayers present them. In the present case there is no claim or suggestion of actual fraud, and on the question of constructive fraud, in addition to the statement heretofore made, there were facts in evidence tending to show that the $150 in change, packed in a box 8 x 8 inches and securely tied, was carried by one of plaintiffs, with another, who had assisted him, to the railroad station, where defendant company had its office; that the express agent having gone home for the day, the other giving assurance that the station agent was dependable, the plaintiff left the package with him for shipment when the express agent should return, stating that the same contained $150 in change, and prepaying the express charges on $150 valuation. These charges being the same whether the shipment was merchandise or money. The next morning the station agent gave the package, which he had cared for during the night and which was untampered with, to the express agent for shipment, telling him it was $150 in value and contained automobile chains. It was proved, and without dispute, that not more than $15 worth of chains could have been placed in a box of that size, and to enclose $150 of automobile chains would have required a box of three feet square. The probability of some mistake about it was well-nigh self-evident, and so patent was this that the express agent himself testifies that his suspicions were aroused as to the contents of the package, and yet in the face of these facts he receives the same for shipment at the valuation of $150, and the charges therefor, without protest and without making any adequate or proper effort to ascertain the real facts. There is doubt if there is any evidence to justify a finding by the jury of constructive fraud, and very certain it is that no such position can be upheld as a conclusion of law, the only way for its consideration being, as stated, as the record presents it to us.

At most, the evidence, in our opinion, only permits the inference of negligent default on the part of the shipper, the station agent acting for plaintiff, having mistaken the word change for chains, but if this were established, it would not be an avoidance of the contract of carriage, though at times allowed to defeat a recovery. In this aspect of the matter, it is the accepted position that a common carrier is held to be an insurer against the loss of goods received for shipment except by act of God, or the public enemy, vices or defects inherent in the nature of the goods, or the negligent default of the shipper, or his agents or employees. And it is also held that where a carrier, in case of loss, seeks to avoid liability by reason of one or more of the excepted causes, it must be made to appear that the exceptions relied upon are the proximate, and usually the sole proximate cause of the loss. *Ferrebee v. R. R.*, 167 N. C., 290; *McCarthey v. Lansover & Nash R. R.*, 102 Ala., 193; 3d Hutchinson on Carriers, sec. ......; 10 Corpus Juris, 119. Here, too, the defendant's prayers presenting the question are all defective in that they make no statement or reference to proximate cause as an element affecting liability, sole or otherwise. And the objections to the rulings of the court on questions of evidence are without merit.

There is nothing to suggest that the copies of receipts and other records as filed with the Interstate Commerce Commission in any way differed from that given to the shipper in the instant case, and which was admitted in evidence. And the clause in the receipt held by plaintiff, which purports to excuse the carrier from liability for loss of a money bullion, etc., shipment, unless "enumerated in the receipt," contains in express terms the limitation that the stated restriction does not apply to "losses attributable to the negligence of defendant or its agents," which negligence has been established by the verdict.

On careful consideration, we find no reversible error, and the judgment for plaintiff is affirmed.

No error.

H. E. DAUGHERTY ET AL. v. COMMISSIONERS OF MOSELY CREEK DRAINAGE DISTRICT ET AL.

(Filed 15 March, 1922.)

1. **Appeal and Error—Evidence—Agreement of Parties—Findings of Fact.**

   Where the parties to the action have agreed that the trial judge shall find the facts on conflicting evidence, such findings, being supported by evidence, are binding and conclusive on appeal.

2. **Drainage Districts—Assessments—Timber—Illegal Assessments.**

   An assessment for benefits on timber growing upon lands in a drainage district, independent from and exclusive of the assessments made upon the lands, is illegal, it being required that the lands only be assessed in accordance with the benefits they receive.

3. **Same — Inequality of Assessment — Deficiency—Reassessment—Commissions.**

   Where timber growing upon lands in a drainage district have been leased, an assessment of the value thereof cannot legally be deducted from the amount of the assessments that have properly been made on the lands, and the board of drainage commissioners, on proper notice, should correct such illegal deductions from the former assessment roll by reassessing these particular lands in accordance with their original classification.

4. **Same—Courts—Orders Preserving Papers—Notice.**

Where it appears that the circumstances of the proceeding require it, it is proper for the trial judge, in correcting an error in assessing leased timber separate from the lands, to order the board of drainage commissioners to prepare and file without delay a statement showing the receipts and expenditures of all funds coming into their hands belonging to the district, have the court papers, maps, etc., recorded, and call a meeting of the landowners of the district.

5. **Drainage Districts — Assessments — Deficiency — Motion in Cause—Actions.**

Where owners of certain lands in a drainage district are injured by a deficiency of the funds caused by an illegal deduction of assessment on the lands of other owners which the commissioners may lawfully correct, a petition in the original proceedings is proper to have the correct assessment made.

APPEAL from *Lyon, J.*, at November Term, 1921, of CRAVEN.

This was a petition filed by H. E. Daugherty and sixty other owners of lands classified and assessed in the Mosely Creek Drainage District, established in Craven County 1 May, 1911, who petitioned in behalf of themselves and all other owners of lands classified and assessed in said district other than the owners of the lands described in the final report of engineer and viewers in said proceedings entitled: "Land of Seth West estate, Tracy Swamp, containing 2,624 acres." The facts in regard thereto are set out in that petition filed January, 1920. In August, 1920, the petitioners asked the court to enjoin the sheriff of Craven from collecting the increased, changed, or new illegal assessment roll in his hands, or from advertising or selling their lands for the purpose of collecting the invalid assessments until their petition could be heard and determined by the court. The temporary restraining order was issued 26 August by Guion, J., and on 8 September, 1920, by consent, the order was continued to the final hearing by Bond, J.

At November Term, 1921, the matter was heard by Lyon, J., trial by jury having been waived by consent of all parties. At the conclusion of the evidence it was agreed that his Honor should try the issues of fact and give his decision in writing.

The petitioners complain of the assessments designated as "new," and they allege and have offered evidence that the "new" or increased assessment was made to recuperate the loss accruing to the district from the erroneous and illegal attempt to revise the original assessment made against the lands of the Seth West estate. The original report says: "It appeared to us that as the timber lands in the swamps of the Seth

West estate will receive benefits from the drainage of said swamps, we hereby make the following classification, based upon the benefit to said timber lands, this classification to be deducted from the classification as to the permanent benefits to the said West estate given above." Examination of the assessment roll shows that all the lands were assessed per acre approximately. The official report shows that the total assessment against the Seth West land amounted to $19,731.21, and that the engineer and viewers, after classifying and assessing the timber separate from the lands, deducted $7,107.02 from the assessment of $19,731.21 against the entire land, and left the balance of $12,624.19 as assessment against the land, exclusive of the assessment against the timber growing thereon. In 1904, when the sheriff attempted to collect the assessment against the timber, the Dover Lumber Company, purchaser of said timber, instituted an action to restrain such collection, and this Court decided that growing timber is not assessable separable from the land upon which it is growing, and the timber lease was not assessable for drainage purposes. *Lumber Co. v. Comrs.,* 173 N. C., 117. This decision prevented the collection of any part of the $7,107.02, which had been assessed against said timber, and the failure to collect said assessment caused a deficit in the funds of said district which began on the first Monday in September, 1914, and has steadily grown, increasing each year by approximately the sum of $710, and interest on all unpaid assessments, and aggregating at 6 per cent interest more than $6,500. Whereas, in truth and in fact, it is much more, because the money borrowed to make up the deficit cost more than 6 per cent interest.

The petitioners contend that the assessment against the timber having been deducted from the assessment of the Seth West estate lands and such deductions having been declared illegal, it is right and proper to restore the amount erroneously deducted from the land on which the timber is growing, and on which the assessment was originally made.

The decision rendered 14 March, 1917, in *Lumber Co. v. Comrs., supra,* held that a timber lease, which had been made of the growing timber on said Seth West estate by a lease of J. W. Stewart, was not assessable for drainage purposes, and the Court held that the attempt to divide the assessment against the Seth West lands between the owner of the land and of the timber growing thereon was illegal and the $7,107.02 having been erroneous deducted from the assessment of the Seth West estate lands and assessed against the timber thereon having never been paid, the nonpayment of said sums caused a deficit in the funds amounting to $10,000, which having been further augmented by the nonpayment of the annual payment, the board of commissioners of said district instructed the secretary of the board to calculate the deficiency and prorate the amount of deficiency among all the lands in the district according to its classification with its pro rata share of such deficiency, and to amend the assessment roll by increasing the original assessment roll of 17 April, 1911, against each tract or parcel of land so that each of said tracts and parcels of land should pay its pro rata share of such deficiency. Pursuant to such instructions, the original assessment roll was changed, and each tract was assessed with its pro rata part of such deficiency with the result that the petitioners claim that they have been assessed several thousand dollars more than they were originally liable for.

The restraining order in this case was issued restraining the sheriff from collecting such increased charges, and the court held that the deduction of $7,107.02 from the original assessment against the lands of the Seth West estate because of the timber thereon having been leased, was erroneous and illegal, and the amount so assessed should be changed and assessed now against lands of the Seth West estate. From this judgment the defendants appealed.

D. L. Ward and R. A. Nunn for plaintiffs.
Moore & Dunn for defendants.

CLARK, C. J. The findings of fact by the court, there being evidence on both sides, is binding and conclusive on appeal. *Shoaf v. Frost*, 127 N. C., 307. The assessment against the land was erroneously divided, and when the court restrained the collection of that part of the assessment against the timber it was equivalent to omitting the assessment on that part thereof and the deficiency should now be reassessed on proper notice to the owner of the "Seth West" lands. The defendants contend on one hand that the petitioners cannot bring this matter up in the original procedure by motion, but only by summons and on petition filed attacking the assessment, but in *Banks v. Lane*, 171 N. C., 505, this Court held as to this same drainage district that such motion should be made in the cause where the facts in regard to the proceedings have record.

That part of the judgment which requires the commissioners to prepare and file without delay a statement showing the receipts and expenditures of all funds coming into their hands belonging to said district, and have the court papers, maps, etc., recorded, and that a meeting of the landowners be held was eminently appropriate, and it seems that the defendants themselves have joined in asking that this be done.

It appears that this proceeding since the creation of the drainage district has been going on about 12 years. Thousands of acres of land and about 100 people owning the lands thereon are involved, maps and profiles have been made, judgment, orders and decrees have been signed in numerous cases. Thousands of dollars have been collected and expended, bonds for a large sum are outstanding, a vacancy in the board of commissioners caused by death has existed for many years, some assessments, one of them against the railroad company, have not been collected, nor any serious attempt made to collect them, yet no meeting nor election has been held for more than 10 years, no account has ever been filed or audited, no paper, map, or other thing has ever been recorded, and the original papers have been shunted around from lawyer's office to lawyer's office in Craven and Lenoir counties. By much handling and cramming into overcrowded envelopes they have become dog-eared, worn, and mutilated, and are likely to be lost or destroyed. The court properly took steps to enforce the law as set out in the Consolidated Statutes relative to drainage districts with a view of protecting the people who, with faith in the law, undertook this expensive and costly work of draining thousands of acres of swamp and overflowed land making it valuable and productive and improving the whole territory for residential and agricultural purposes.

His Honor properly adjudged that the additions to the original assessment roll to make up out of other tracts of land the deficiency caused by omitting from the assessment of the Seth West tract the value of the growing timber, $7,107.02, leased to Stewart, was illegal, and should be set aside, and the collection thereof restrained, and that the whole of such deficiency should be assessed as in the original roll against the Seth West estate.

Affirmed.

J. O. PROCTOR AND BROTHER v. CAROLINA FERTILIZER AND PHOSPHATE WORKS ET AL.

(Filed 15 March, 1922.)

1. **Injunction—Issuable Matters—Fraud—Deceit.**

Where a permanent injunction is the main relief sought in the action, and the pleadings and affidavits disclose serious controverted questions of fact, tending to show deceit and fraud by which the plaintiff would be deprived of his right, were the restraining order dissolved, it should be ordered continued to the hearing so that the facts may be properly ascertained by the jury and the law applied.

2. **Same—Irreparable Loss.**

Where the plaintiff, applying for injunctive relief as the main remedy sought in his action, has shown probable cause, or it is made to appear that he will be able to make out his case at the final hearing, or where the dissolution of the temporary restraining order would probably work him irreparable injury, it should be continued to the final hearing.

3. Same—Corporations—Bills and Notes—Banks and Banking—Certificates of Deposit.

Where there is conflicting evidence, upon the hearing of an injunction, that a corporation has, by the fraudulent misrepresentations of its stock soliciting agent, obtained the note of the plaintiff, and the corporation has discounted it at a bank under agreement to let the money stay in the bank under a certificate of deposit; and in order to defeat the rights of the plaintiff the officers, without authority, have collusively transferred the certificate to a relative of the president, for the president's personal benefit, the defendant's claim as a *bona fide* holder for value raises a material issue of fact that the jury should determine upon the final hearing.

4. Same—Fraudulent Holder of Certificate of Deposit.

Where there is evidence, upon the hearing for a permanent injunction, that the stock soliciting agent of a corporation had procured the plaintiff's note for the corporation by fraud, and it had discounted the note at a bank and held a certificate of deposit therefor: and in fraudulent collusion with the defendant had transferred to him the certificate of deposit for the personal benefit of the president of the corporation: *Held*, the fraudulent transaction as to the note being traceable to the certificate of deposit, the defendant may be restrained from collecting it from the bank.

APPEAL by Jesse Fussell from PITT, heard by *Lyon, J.*, at Beaufort, 17 August, 1921, from a continuance of restraining order to the hearing.

This action was begun originally against the Carolina Fertilizer and Phosphate Company and the Bank of Grimesland to restrain the payment by the Bank of Grimesland of certain money deposited therein, and for which a time certificate had been issued. Later, the Bank of Rose Hill and Jesse Fussell were made parties defendant in the restraining order issued in said proceedings which were heard before Lyon, J., 17 August, 1921, at Beaufort, who continued the restraining order to the hearing.

There is evidence tending to show that prior to 4 September, 1920, the defendant fertilizer company was incorporated in this State to manufacture and sell fertilizers and proceeded to employ a force of agents to sell its stock throughout the eastern part of the State. On 4 September, 1920, an agent of the company approached the plaintiffs representing that the company was a going concern; that it had two fertilizer plants in operation, one at Greenville, N. C., and another at Fairmont, N. C., and was building another at Rocky Mount, N. C.; that it was ready and prepared to deliver fertilizer from the Greenville plant and supply the plaintiffs with all the fertilizer they might need for their own use and for sale during 1921, and that it would deliver to the plaintiffs at least 500 tons of fertilizer of standard make for the 1921 crop, and that it would sell said fertilizer $3 to $4 cheaper per ton than plaintiffs could buy it elsewhere, provided they were stockholders;

that said company would guarantee the plaintiffs that they would pay the amount of $10,000 as dividends and reduce the amount in price of fertilizer within the space of 12 months; that said company was perfectly solvent, owned large assets, and was amply able to carry out and comply with all contracts and agreements.

It was further alleged in the complaint treated as an affidavit, that relying upon these assurances and guarantees the plaintiffs were induced to subscribe for $10,000 of stock, and executed and delivered their note in that sum, dated 4 September, 1920, due and payable 1 October, 1921; that soon thereafter said company attempted to sell and deliver to the Bank of Grimesland plaintiffs' note for $10,000 for $9,800, and as an inducement to said bank to purchase said note agreed that the $9,800 should remain in the bank for 12 months if the bank would issue them a certificate for such amount, payable to said company, which was done; that soon thereafter the plaintiffs were informed and believed that all the statements and guarantees by the agents of the company were false and untrue, and were made for the purpose of defrauding these plaintiffs, and the said notes were secured through falsehood, fraud, misrepresentation, and deceit of said agents, which was known to the company; that said company was not solvent, nor able to meet its obligations; had no factories or plants in operation, not even a title to real estate in Greenville; was not able to furnish any fertilizer, but as a matter of fact was heavily involved, had acquired no property, and was proceeding, in violation of the laws of North Carolina, in selling said stock; that later said company attempted to convey said certificate of stock to its codefendant, Jesse Fussell, a cousin of D. C. Fussell, president of the company, when in truth and fact the said Jesse Fussell was not a purchaser for value without notice, but was only used by the said company and D. C. Fussell, president, to carry out their scheme in defrauding, or attempting to defraud, the plaintiffs.

On 11 July, 1921, the affairs of said company were placed in the hands of receivers as being insolvent, and said receivers are now trying to settle the affairs of the company; when the records and minutes were delivered to said receivers they contained no authority for transferring or assigning any time certificate or notes, and plaintiffs allege that the obtaining of the note, the time certificate, and the attempted transfer of the time certificate were acts all done in an attempt to collect said time certificate, which was procured through fraud, misrepresentation, and deceit of the company's agent, which was well known to the defendant Jesse Fussell, and this action was brought to restrain the collection and have the note canceled as well as the time certificate.

Upon the hearing, the court finding that "all the parties to the transaction involved are before the court, and further finding that the material facts necessary to a proper determination of the action are in dispute, and should be submitted to a jury continued the restraining order in full force and effect until the final determination of this cause, and it further appearing to the court that codefendant Jesse Fussell claimed to be the owner of the certificate of deposit, set out in the complaint, which certificate is held by the Bank of Rose Hill, the said Jesse Fussell, his agent and attorneys, are hereby enjoined and restrained from attempting to take possession or collect said certificate until the final determination of this Court." The court required the plaintiffs to file in the cause a bond in the sum of $5,000, payable to the defendant Jesse Fussell, upon the payment of all damages which he may recover against the plaintiff. It also appeared in the record that the defendant Carolina Fertilizer and Phosphate Company, at its meeting 12 June, 1920, fixed the salary of its president at $6,000 per annum plus 50 cents per ton for all fertilizers produced and manufactured over 5,000 tons for the first year, the salary to begin on 15 April, 1920, and thereafter authorized a mine foreman at a salary of $200 per month, also to be back-dated to 15 April, 1920; and authorized the employment of sundry other officers, and with authority given to the secretary and treasurer to employ accountants and office assistants and fix their salaries. The president and treasurer, or either of them, were also authorized to issue the notes of the company in such sums and amounts as they might determine, payable to any bank, person, firm, or corporation, and that the president and secretary and treasurer, or either of them, was authorized to endorse and transfer any bills receivable, check, or certificate of deposit belonging to the company, and to discount or transfer the same or use it as collateral security. From the order continuing the restraining order to the hearing the defendant Jesse Fussell appealed.

F. G. James & Son for plaintiffs.
Stevens, Beasley & Stevens for Jesse Fussell.

CLARK, C. J. From an inspection of the pleadings, affidavits, and orders it appears that there were serious controverted questions for the jury to decide at the final hearing upon the allegations and evidence tending to show deceit and fraud. In such case the usual rule is that when, as here, the injunction is the main relief demanded, it will be continued to the hearing in order that the truth of the matters in controversy can be ascertained, and justice more certainly and fully administered, especially where serious questions are raised and it is necessary for the plaintiff's protection that matters be held in abeyance until the facts can be properly ascertained and the law duly applied. In *Tise v. Whitaker,* 144 N. C., 508, *Hoke, J.,* says: "It is a rule in an action of this character, where the main purpose is to obtain a permanent injunction, if the evidence raises a serious question as to the existence of facts which make for the plaintiff's right, and sufficient to establish it, the preliminary restraining order is continued to the hearing." When the plaintiff has shown probable cause, or it may be seen that he will be able to make out his case at the final hearing, the injunction will be continued. *Seip v. Wright,* 173 N. C., 14; *Yount v. Setzer,* 155 N. C., 213; *Hyatt v. DeHart,* 140 N. C., 270. This Court has repeatedly held that where the dissolution of the injunction would probably work irreparable injury to the plaintiff, it should be continued to the hearing. The bond required of the plaintiff, and which has been duly filed, will be ample protection to the appellant against any apprehended damage.

The defendant Jesse Fussell further assigns as error that the injunction should have been dissolved because the evidence discloses that Jesse Fussell is the *bona fide* holder in due course of the certificate of deposit in the Bank of Greenville, and there is no evidence to the contrary. Section 15, however, of the complaint, treated as an affidavit, alleges that no authority was vested in D. C. Fussell, or any officer of the company, to transfer the certificate, that it was obtained by fraud and deceit, which was known to the said Jesse Fussell, and that he is not a purchaser for value in due course and without notice; that he is a cousin of the president of the company, and was merely attempting to collect said certificate for the use and benefit of D. C. Fussell, and that he was not the *bona fide* holder thereof. Upon such affidavit and allegations the matter should be held until the facts can be determined.

The defendant Fussell also assigns as error that it is not shown how the certificate of deposit was secured, but it is further alleged in the complaint treated as an affidavit, that it was procured through fraud, misrepresentation and deceit; and further, that the money for said note remaining in the Bank of Grimesland should not be paid out, upon the strength of a note whose assignment was procured by the defendant through fraud, as alleged.

In *Mfg. Co. v. Summers,* 143 N. C., 102, *Hoke, J.,* says: "When a man's property has been obtained from him by actionable fraud or covin, the owner can fully recover it from the wrongdoer as long as he can identify or trace it; and the right attaches not only to the wrongdoer himself, but to any one to whom the property has been transferred otherwise than in good faith and for valuable consideration; and this applies not only to specific property, but to money and choses in action." In that case the verdict of the jury having established the right of the plaintiff to a fund in bank as against one of the defendants who was insolvent and had attempted to misappropriate it, the payment of a cashier's check covering said fund which he had endorsed to the other defendant, was restrained until the rights of parties were fully determined.

In *Parker v. Grammer,* 62 N. C., 28, it was held: "Where there is reason to apprehend that the subject of the controversy will be destroyed or removed or otherwise disposed of by the defendant, pending this suit, so that the complainant may lose the fruit of his recovery or be hindered or delayed in obtaining it, the Court will secure the fund by sequestration and injunction until the main equities are adjudicated in the hearing." All the parties being in court, it was eminently proper that all the matters in controversy should be determined in the same action, and that the litigation being in one forum, a multiplicity of suits may be avoided.

Affirmed.

R. F. BUTT v. W. C. MOORE.

(Filed 15 March, 1922.)

Evidence—Separate Causes of Action—New Trial as to One Cause—Appeal and Error.

Upon allegation of two causes of action for breach of contract, one, the defendant's liability to pay the plaintiff the agreed price for grading tobacco, and the other the defendant's failure to furnish fertilizer as agreed: *Held,* the evidence in this case was sufficient to be submitted to the jury upon the second cause of action; and the jury having answered in the defendant's favor in the first cause, a new trial is awarded on the plaintiff's appeal, on his alleged second cause of action alone.

APPEAL by plaintiff from *Lyon, J.,* at August Term, 1921, of PITT.

Civil action to recover damages for an alleged breach of contract. The plaintiff complained that he was a tenant on the farm of the defendant for the year 1916, and that he entered into an agreement or contract with the defendant whereby the said defendant agreed to pay for one-half of all tobacco grading, and to furnish the said plaintiff 300 pounds of fertilizer to the acre of cotton and corn, and alleges that the defendant failed and refused to pay for one-half of the tobacco grading, which was $21; also failed to furnish the amount of fertilizer agreed upon in said contract, whereby the plaintiff suffered a loss of $21.60.

The court submitted to the jury the question of grading the tobacco, but declined to allow them to consider the alleged shortage and failure to furnish the full amount of fertilizer.

There was a verdict and judgment in favor of the defendant; plaintiff appealed.

Julius Brown for plaintiff.
F. G. James & Son for defendant.

STACY, J. The plaintiff set up two causes of action: one for failure to pay one-half of the cost of grading the tobacco; and the other for failure to furnish the amount of fertilizer as agreed upon between the parties. His Honor declined to submit the second cause of action to the jury. In this we think there was error. True, the evidence of the plaintiff is not very satisfactory on this phase of the case—and that of the defendant quite positive—but we think it was sufficient to require its submission to the jury.

As we find no error in the trial of the first cause of action, the new trial will be limited to the second phase of the case.

Partial new trial.

MATTIE PAUL v. RELIANCE LIFE INSURANCE COMPANY.

(Filed 15 March, 1922.)

1. **Insurance, Life—Days of Grace—Premium—Time of Payment—Forfeiture—Waiver.**

The time limited by a contract of life insurance for the payment of premiums to avoid a forfeiture is for the benefit of the insurer, which it may waive by its acts and conduct.

2. **Same—Evidence.**

The days of grace for payment of a life insurance premium were out on 3 August. On 27 July preceding, insurer wrote calling attention to the forfeiture, and offering to make helpful suggestions for payment. Insured's immediate reply offering premium note was received by insurer on 2 August, and on the same day it wrote enclosing its form note for a part of the premium and requesting a cash payment for the balance, evidently too late for a compliance by due course of mail by 3 August, which was received by the insured on 6 August, and on the following day he signed and mailed the note and his check for the cash balance; 10 August the insurer wrote declining acceptance, and insisted on the forfeiture. On the day following the insured died of sudden illness, and the beneficiary instituted this action on the policy: *Held*, the evidence raised a reasonable inference of the defendant's waiver of the strict time limit for payment, and that the insured acted with reasonable promptness, sufficient for the determination of the jury, and an instruction directing a verdict for defendant constituted reversible error.

APPEAL by plaintiff from *Lyon, J.,* at November Term, 1921, of PAMLICO.

Civil action to recover on a life insurance policy issued by the defendant to Reginald Paul, now deceased, the plaintiff being named as beneficiary in said contract of insurance.

From a verdict and judgment in favor of defendant, the plaintiff appealed, assigning errors.

D. L. Ward and F. C. Brinson for plaintiff.
Guion & Guion for defendant.

STACY, J. On 3 July, 1919, the defendant entered into a contract of insurance with plaintiff's minor son, a boy fifteen years of age, whereby it was agreed that the Reliance Life Insurance Company of Pittsburg, Pa., would pay to the plaintiff, mother of the insured, the sum of $5,000 upon receipt, at its home office in Pittsburgh, of due proof of the death of Reginald Paul; provided, said contract of insurance was in full force and effect at the time of his death. The second annual premium of $135 was due and payable on 3 July, 1920, with one month or 31 days of grace, during which time it was provided that the insurance should remain in force; but it was further stipulated: "If any premium or installment thereof be not paid before the end of the period of grace, then this policy shall immediately cease and become void, and all premiums previously paid shall be forfeited to the company." This second premium was not paid when due, nor strictly within the period of grace allowed by the terms of the policy; but it is contended that the defendant waived a strict compliance with the provisions, in respect to time, and that the policy was in force on 11 August, 1920, the date of the death of the insured.

The facts relating to the alleged waiver are as follows: On 26 July, 1920, the defendant, writing from its office in Charlotte, N. C., addressed a letter to the insured at Grantsboro, N. C., calling his attention to the fact that the last day of grace for the payment of his insurance premium would expire on 3 August; and further added: "If it is inconvenient for you to pay the premium at this time, or if you are delaying payment for any other reason, we shall be glad to have you advise us immediately as no doubt we shall be able to offer to you some suggestion that will be of benefit to you." Immediately upon receipt of this letter, the insured and his father, Smith Paul, replied, writing in pencil at the bottom of defendant's letter, as follows: "Gentlemen:—Please let us give you our note, due 1 November, 1920." This communication reached Charlotte 2 August, and on the same day the defendant answered, saying: "In reply to yours of recent date in regard to payment of premium on the above policy we regret to advise that as you have paid only one premium on this policy the company cannot accept a note for the entire amount of the premium. However, we can accept as small a cash remittance as $17, and take your note for the balance of $118, due 3 October. If this proposition meets with your approval, kindly sign the extension note and return to us at once, together with your check for $17. The days of grace expire on your policy 3 August, and it is therefore very necessary that you let us have this settlement promptly to avoid the lapsing of your insurance."

Enclosed with this communication was a note for $118 made out on a special form used by the defendant. The insured did not receive said letter until the night of 6 August; and on the following morning, 7 August, his father, who was attending to the matter for him, at the request of the insured, went to the postoffice in Grantsboro and mailed the defendant a check for $17 and the note for $118, which had been duly executed by Reginald Paul, as per instructions in the defendant's letter of the 2d instant. On 10 August the defendant acknowledged receipt of the note and check, but stated that, as the last day of grace had expired, it would be necessary for the insured to furnish a personal health certificate before the policy could be reinstated. This was in accordance with its provisions. The insured died on 11 August. He had made no complaint, and apparently was well on 7 August, up to the time his father mailed the letter containing the note and check.

At the close of the evidence, his Honor directed a verdict for the defendant; plaintiff excepted.

It is conceded that but for the defendant's letters of 26 July and 2 August the case at bar would be controlled by the decision in *Clifton v. Ins. Co.,* 168 N. C., 499. But, in view of these communications, plaintiff contends that it comes under the doctrine announced in *Murphy v. Ins. Co.,* 167 N. C., 334, wherein it was held that "this provision as to forfeiture, being inserted for the benefit of the company, may be waived by it, and such a waiver will be considered established and a forfeiture prevented whenever it is shown that there has been a valid agreement to postpone payment, or that the company has so far recognized an agreement to that effect, or otherwise acted in reference to the matter as to induce the policyholder, in the exercise of reasonable business prudence, to believe that prompt payment is not expected, and that the forfeiture on that account will not be insisted on." This position is amply supported by the authorities cited in the *Murphy case, supra.*

It should be observed that the defendant's letter of 2 August, which admittedly could not have reached Grantsboro before the evening or night of the 3d, requested that the note be signed and returned with check at once, if the proposition meet with approval, and prompt action was urged in order to avoid a forfeiture. Plaintiff contends that this, of necessity or by reasonable interpretation, clearly anticipated an acceptance of the defendant's counter offer after 3 August. Plaintiff further says that immediately upon receipt of this letter the offer was accepted and the note and check promptly mailed back to the defendant. This is denied by the defendant; but, considering all the facts and circumstances, we think the question as to whether there had been a waiver of the strict time limit, and further, as to whether the insured acted with reasonable promptness, should be submitted to the jury under proper instructions from the court.

"A course of action on the part of the insurance company which leads the party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract." *Coile v. Com. Travelers,* 161 N. C., 104; *Ins. Co. v. Eggleston,* 26 U. S., 577; *Ins. Co. v. Norton,* 96 U. S., 234.

The defendant, of course, contends that no waiver was intended or made; and that, on the contrary, the insured's attention was specifically directed to the necessity of acting within the period of grace allowed by the terms of the policy. The facts present a situation from which conflicting inferences may be drawn. This makes it a case for the jury. We think his Honor erred in directing a verdict.

New trial.

THOMAS J. MITCHELL v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 15 March, 1922.)

1. **Statutes—Amendments—Interpretation.**

The language of a statute, or of an amendment thereto, is presumed to have some meaning, and will be so construed in permissible instances.

2. **Same—Carriers of Goods—Penalties—Transportation—Delivery—Negligence.**

The penalty imposed upon a carrier for unreasonable delay in transportation of goods, was judicially determined not to apply to delivery under the provisions of Revisal (1905), sec. 2632, and hence a subsequent amendment by the Laws of 1907, that such delay shall not be construed as referring to delay in starting the shipment, but shall apply also to "its delivery at its destination within the time specified," with the further provision that the carrier shall be relieved from the penalty if it is established to the satisfaction of the justice of the peace or the jury, that the delay was incident to causes that could not be foreseen in the exercise of ordinary care: *Held*, C. S., 3516, in which these statutes are brought forward, extends the penalty to cases of negligent default in the carrier's making delivery of the freight to the consignee.

3. **Same—Evidence—Questions for Jury—Nonsuit—Trials.**

In an action for the penalty prescribed for the unreasonable transmission and delay in the delivery of goods by the carrier, there was evidence that a shipment of various articles was transported by the carrier to destination, and all were received by the consignee, except one of them, which was missing, and remained in the carrier's warehouse beyond the statutory reasonable time: *Held*, sufficient upon the question of the carrier's liability for the penalty, and a motion as of nonsuit, and a prayer for instruction directing a verdict on the evidence for defendant, were properly refused. *Wall v. R. R.*, 147 N. C., 407, cited and distinguished.

APPEAL by the defendant from *Lyon, J.*, at the November Term, 1921, of CRAVEN.

Civil action, tried on appeal from a justice's court. The action is to recover a statutory penalty for negligent delay in the transportation and delivery of freight under C. S., 3516. There was denial of liability, and the cause submitted to the jury on the issue as to unreasonable delay; and, second, the amount recoverable for same, etc.

The plaintiff testified as follows: "That under the bill of lading of 13 April, 1920, the two boxes of clipping machines, one box of hardware, and ten packages of cart rims and five bundles of cart spokes were shipped from the N. Jacobi Hardware Company; that on 15 April, 1920, he was notified by the usual postal card notice that all the property covered by said bill of lading was in New Bern, and that on or about 16 April he received from the defendant all the property covered by the said bill of lading, except one box of clipping machines, the same marked short as per plaintiff's bill attached.

"He further testified that he would not have received the notice unless the freight had been in New Bern at the time. That when the other property covered by the bill of lading was delivered to him, or to his drayman, that one box of clipping machines was not delivered; that on 8 June the missing box of clipping machines was found in the Atlantic Coast Line warehouse in New Bern, and was delivered to him. The plaintiff offered the bill of lading dated 13 April, 1920, and the freight bill dated 15 April." The bill of lading was introduced, showing an entire shipment, including the missing box.

At the conclusion of plaintiff's testimony there was motion for nonsuit, overruled, and exception.

Second, defendant then offered a prayer for instruction as follows: "That if the plaintiff was notified on 15 April that the shipment had reached New Bern, and the jury find that the box that was not delivered was in the warehouse at the time and not delivered to plaintiff until 8 June, that the defendant has transported the same in reasonable time, and they should answer the first issue 'No.'" Prayer refused, and defendant excepts.

There was verdict for plaintiff, and assessing his damages for delay at $39, amount allowed by the statute. Judgment, and defendant appealed, assigning errors.

W. D. McIver for plaintiff.
W. A. Towns and Moore & Dunn for defendant.

HOKE, J. Under the statute as it formerly prevailed, Revisal of 1905, sec. 2632, a penalty was imposed for unreasonable delay in the *transportation* of goods. Construing the statute in *Alexander v. R. R.,* 144 N. C., 93, the Court held that the term "transportation" did not include a delivery to consignee at the point of destination, and if goods shipped by a carrier had been properly placed at the point of destination, no penalty was incurred under the law for a negligent delay in delivery from the car or warehouse of the company. Subsequent to the facts presented in that case, the Legislature amended the statute (Revisal 1905, sec. 2632), and in ch. 461, Laws of 1907, provided: "That the act imposing a penalty for delay in the transportation of freight shall not be construed as referring only to delay in starting the goods from the station where received, but, in addition thereto, shall be construed to require delivery at its destination within the time specified." And with the provision, "That if the delay be incident to causes which could not have been foreseen in the exercise of ordinary care, and which were unavoidable, and these facts are established to the satisfaction of the justice of the peace or jury trying the cause, the defendant company shall be relieved from the penalty," etc. An amendment which has been included in C. S., 3516, and being part of the section on which the present action is instituted.

A statute or amendment formally passed is presumed and if permissible should be construed so as to have some meaning, and unless the amendment referred to is intended to extend the penalty to cases of negligent default in making delivery of freight to the consignee, it will be entirely without significance. This assuredly is the permissible and reasonable construction of the law, and we are of opinion that his Honor made correct decision in denying defendant's prayer for instructions.

There is nothing in *Wall v. R. R.,* 147 N. C., 407, that in any way militates against this interpretation of the statute. In that case the company was contending that the penal statute ceased to apply when it had placed the shipment, a carload lot, in the company's yards at Winston-Salem, the point of destination. In disallowing the position, the Court said the statute continued to apply until the goods were in the company's warehouse, and notice duly given. There was nothing to call the Court's attention to the effect of the amendment so recently made, and as a matter of fact, this amendment did not apply to the case as the facts determining liability had taken place and transaction terminated before the amendment to the law was made.

We find no error in the record, and the judgment of the Superior Court is affirmed.

No error.

FIRST NATIONAL BANK v. W. R. SAULS ET AL.

(Filed 15 March, 1922.)

1. **Mortgages — Title — Cancellation — Bills and Notes — Assignment—Statutes.**

   Where a note, secured by a mortgage, is assigned and pledged as collateral by the mortgagee to his own note, without an assignment of the mortgage conveying title for the purpose of the security, but which was only left with the payee of his note, the legal title to the lands remains in the mortgagee, who alone is authorized to cancel the mortgage. C. S., 2594 (1).

2. **Same—Registration—Notice.**

   Where the lender of money accepts as collateral a note secured by mortgage, in order to protect himself he must have the legal title transferred and assigned to him by a proper conveyance for the purpose, and have it registered as notice against subsequent conveyances for value, etc.; otherwise, the assignment of the note can operate on the note alone.

3. **Same—Mortgagees—Cancellation in Person—Exhibit of Instruments—Satisfaction.**

   Only the mortgagee is entitled to have his mortgage canceled on the book in the office of the register of deeds, either in person, C. S., 2594 (1), or by the register of deeds upon the exhibition of the mortgage and note properly endorsed by him, C. S., 2594, subsecs. 2 and 3; and when the mortgagee cancels the instrument in person, under subsec. 1, it is a complete release and discharge of the mortgage, subsec. 4, for in such case the statute does not require the exhibition of the mortgage and the note it secures.

4. Same—Collateral.

The legal title to mortgaged lands is conveyed by the instrument to the mortgagee, and remains in him until transferred or assigned, for the purpose of the security or the cancellation of the instrument, C. S., 2594; and where the mortgagor has afterwards conveyed the fee-simple title to another, and receives a mortgage back to secure a note for the balance of the purchase price of which the same mortgagee becomes the holder, his personal cancellation of the first mortgage, without producing it or the note it secures, is a complete discharge or release of the lien thereof, and where he borrows money after such cancellation, and hypothecates the note of the second mortgage as collateral to his own, the lender for the purposes of the security, acting in good faith, has a prior lien on the lands.

5. Mortgages—Deeds and Conveyances—Statutes—Connor Act.

The Connor Act, requiring the registration of conveyances to give notice to subsequent purchasers, etc., includes mortgages within its terms.

APPEAL by plaintiff from *Cranmer, J.*, upon a controversy submitted upon facts agreed at February Term, 1922, of CRAVEN.

The defendant J. L. Sauls, on 8 September, 1919, executed to Sauls & Lamb his notes for $6,000, secured by mortgage upon a tract of land in Craven County, which was duly registered 10 September, 1919, and thereafter, on 18 November, 1919, the mortgagees obtained a loan of $4,000 from the plaintiff First National Bank of Kinston to which they delivered the mortgage notes aforesaid as collateral security, and left with the bank, without an assignment thereof, the mortgage securing the notes. Thereafter, on 27 January, 1920, the mortgagor, J. L. Sauls, executed a warranty deed for the same tract of land to Lafayette King and wife, who executed to William Dunn, Jr., trustee, a deed of trust thereon to secure the notes executed for the purchase money thereof. On 13 July, 1920, the mortgagees, Sauls & Lamb, in the first mortgage, canceled the record of the mortgage, which had been executed to them by J. L. Sauls on the record thereof in the register's office of Craven by making this entry thereon: "This mortgage has been paid and satisfied in full. This 13 July. Sauls & Lamb, by R. W. Lamb. Witness, S. H. Fowler, register of deeds"; and thereafter they obtained a loan for $8,500 from the People's Bank of New Bern by placing as collateral security for such loan the notes executed by King and wife, and secured by deed of trust above referred to.

The said entry of satisfaction on the margin of the record of said mortgage given by said J. L. Sauls to Sauls & Lamb was made without the knowledge, consent, or authority of the plaintiff, and plaintiff did not discover such entry until about 8 December, 1921, just prior to the commencement of this action.

The court adjudged, upon the facts agreed, that the loan made by the People's Bank upon the notes secured by the King deed of trust is protected by the cancellation of the mortgage, which was a prior mortgage to the King deed of trust until its cancellation, and held that such cancellation upon the record operated upon the mortgage and the record of registration for the discharge of this prior encumbrance. Appeal by plaintiff.

R. A. Nunn for plaintiff.
Guion & Guion for defendant.

CLARK, C. J. Upon the facts agreed there was no assignment of the mortgage of J. L. Sauls to Sauls & Lamb to the plaintiff First National Bank of Kinston, but the said mortgage was merely left by them with the cashier of the bank. Therefore the legal title of the land described in this mortgage was never divested from the mortgagees, Sauls & Lamb. *Williams v. Teachey,* 85 N. C., 402. And under C. S., 2594 (1), the mortgagees, Sauls & Lamb, still holding the legal title, were alone authorized to cancel the mortgage.

The First National Bank of Kinston, with whom Sauls & Lamb left the notes which they held as mortgagees of J. L. Sauls, could have protected itself by requiring the transfer and assignment of the mortgage which conveyed the land therein described, and by registration of such assignment would have given notice to the world that as assignee of such mortgage this bank alone was authorized to make cancellation thereof. But in the absence of such notice, the mortgagees having entered cancellation thereof, this became an absolute release and discharge.

The question above presented has been so fully and well considered by this Court in several cases, to wit: *Weil v. Davis,* 168 N. C., 298; *Hayes v. Pace,* 162 N. C., 288; *Jones v. Williams,* 155 N. C., 179; which have been cited with approval in *Parrott v. Hardesty,* 169 N. C., 669, that it is not necessary to look further for authority for the ruling therein so clearly announced that there must be an assignment of a mortgage on real estate, to operate upon the land described in the mortgage in order that the power of sale may pass to the assignee. If this is not done the legal title will remain in the mortgagee and the assignment of the notes can operate only on the notes.

It follows that in this case the legal title remained in Sauls & Lamb, the mortgagees, after the deposit of the mortgage notes and of the unassigned mortgage with the National Bank of Kinston and by virtue of C. S., 2594, already cited, the mortgagees were authorized to make the entry of cancellation.

The following is the language of C. S., 2594: "*Discharge of record of mortgages and deeds of trust.* Any deed of trust or mortgage registered as required by law may be discharged and released in the following manner:

"1. The trustee or mortgagee, or his or her legal representative, or the duly authorized agent or attorney of such trustee, mortgagee, or legal representative, may, in the presence of the register of deed or his deputy, acknowledge the satisfaction of the provisions of such deed of trust or mortgage, whereupon the register or his deputy shall forthwith make upon the margin of the record of such deed of trust or mortgage an entry of such acknowledgment of satisfaction, which shall be signed by the trustee, mortgagee, legal representative, or attorney, and witnessed by the register or his deputy, who shall also affix his name thereto.

"2. Upon the exhibition of any mortgage, deed of trust, or other instrument intended to secure the payment of money, accompanied with the bond or note, to the register of deeds or his deputy, where the same is registered, with the endorsement of payment and satisfaction appearing thereon by the payee, mortgagee, trustee, or assignee of the same, or by any chartered active banking institution in the State of North Carolina, when so endorsed in the name of the bank by an officer thereof, the register or his deputy shall cancel the mortgage or other instrument by entry of 'satisfaction' on the margin of the record; and the person so claiming to have satisfied the debt may retain possession of the bond or mortgage or other instrument. But if the register or his deputy requires it, he shall file a receipt to him showing by whose authority the mortgage or other instrument was canceled.

"3. Upon the exhibition of any mortgage, deed of trust, or other instrument intended to secure the payment of money by the grantor or mortgagor, his agent or attorney, together with the notes or bonds secured thereby, to the register of deeds or his deputy of the county where the same is registered, the deed of trust, mortgage, notes, or bonds being at the time of said exhibition more than ten years old, counting from the date of maturity of the last note or bond, the register or his deputy shall make proper entry of cancellation and satisfaction of said instrument on the margin of the record where the same is recorded, whether there be any such entries on the original papers or not.

"4. Every such entry thus made by the register of deeds or his deputy, and every such entry thus acknowledged and witnessed, shall operate and have the same effect to release and discharge all the interest of such trustee, mortgagee, or representative in such deed or mortgage as if a deed of release or reconveyance thereof had been duly executed and recorded."

The language of subsection 4 thereof explicitly provides that such entry shall operate "to release and discharge all the interest of the trustee or mortgagee" as fully "as if a deed of release or conveyance thereof had been duly executed and recorded."

This matter is fully and clearly stated and held in *Smith v. Fuller,* 152 N. C., 13. The People's Bank of New Bern had the records of the county examined, and finding therein the mortgage to Sauls & Lamb properly canceled by the mortgagees, was absolutely protected in the loan made to the holders of the notes secured by the King deed of trust.

In *Morton v. Blades,* 144 N. C., 34, the Court used this language, the opinion being written by the distinguished author of the Connor Act: "It appears from the statement of his Honor, in the case on appeal, that the plaintiffs relied, in support of their motion, on the fact that the assignment had not been registered. We concur with his Honor that as between the parties and their heirs it was not required to be registered. Treating it as a deed of conveyance carrying the legal title, we know of no statute or decision requiring its registration, *when the rights of no creditors or purchasers intervene."* In this case the notes secured by the mortgage were past due, and the mortgagees certified to the bank that they had been paid and satisfied and there was nothing which pointed to any transfer of the mortgage securing the same.

The plaintiff's counsel contends that in addition the bank should have required the mortgagee to produce the notes and mortgage. If the notes and mortgage had been paid the mortgagees would naturally not be in possession. They would legally have been delivered to the mortgagor, and there was nothing in the statute which required the creditor or purchaser to seek the mortgagor and inquire of him whether they had been paid. The second section of C. S., 2594, requiring cancellation, expressly provides that if not canceled by the mortgagee or trustee, that the mortgage or deed of trust, with the note secured, may be produced, and, if marked satisfied, the register of deeds shall mark the instrument canceled. Neither notes nor mortgages are required to be produced when the mortgagee in person makes or authorizes the cancellation.

It would seem that this defect in the statute might be remedied by legislation so as to require that the notes and mortgage shall be produced when the mortgagee enters the cancellation, but that is a matter for the legislative department.

The statute is plain, and in the absence of fraud participated in by the creditor or purchaser, if the statute is followed the creditor is protected by the entry of cancellation of the mortgage which, if made in the manner provided in the statute, is conclusive. Certainly the Connor Act applies to the registration of mortgages as against creditors and purchasers for value, which are included in the term "conveyances."

Mortgages have been uniformly held by this Court to be conveyances of the legal title, and require the formality of a conveyance in their assignment as against purchasers for value, and, therefore, as against purchasers, the legal title vested in the mortgagee comes within the provisions of the registration act. Any protection against such result as has been produced in this case must be sought by appropriate action from the law-making department of the State.

Affirmed.

CORPORATION COMMISSION v. FARMERS BANK AND TRUST COMPANY.

(Filed 15 March, 1922.)

1. **Appeal and Error—Judgments—Fragmentary Appeals—Dismissal—Banks and Banking — Corporations— Receivers—Collateral—Collection—Trusts.**

A bank borrowed money from one of its correspondent foreign banks, and hypothecated certain local papers as security, which the correspondent bank sent back to the borrowing bank in trust to collect and apply the proceeds to the indebtedness. The borrowing bank became insolvent and a receiver was appointed for it, who, after notice, and claims of creditors filed, refused the stated claim as a preference, and the court, passing upon the matter, sustained the exception and reserved judgment as to the other claims. There was evidence that the insolvent bank had collected some of the collateral, and had hypothecated other of the collateral to its note given to another bank for money borrowed: *Held*, the judgment rendered only as to this one claim was fragmentary, and will be dismissed.

2. **Same—Record—Suggestions—Parties—Receivers—Reports.**

Upon this fragmentary and partially insufficient record, on appeal, and the case as presented thereon, the Supreme Court suggests that the second bank receiving the collateral sent for collection by the claimant bank be made a party to the suit; and that the report show the amount of indebtedness to the bank claiming the preference, together with the entire amount of the collateral held by it as security for its indebtedness, and its value to the extent practicable.

APPEAL by receivers from *Devin, J.*, at the November Term, 1921, of LENOIR.

Civil action, heard on certain exceptions to report of a receiver.

The record is so imperfect that it is difficult to make satisfactory disposition of the cause, but it appears, we think, with sufficient certainty, that an action was instituted under the provisions of the Consolidated Statutes, to wind up the affairs of an insolvent bank, the Farmers Bank & Trust Company of La Grange, N. C., and a receiver was appointed.

Notice was issued for all creditors to present their claims in writing before said receiver at a specified time and place. That said receiver appeared pursuant to said notice and considered and passed upon all claims that were filed. And thereupon said receiver made his report. And the same is in part in the present record, beginning with section 9. From which it appears that the Hanover Bank of New York claims a preference in the assets by reason of certain collateral sent to insolvent bank for collection, before its doors were closed, under a trust agreement to collect and hold as security for an indebtedness to this bank. It further appears in this excerpt from receiver's report that the insolvent bank, before it closed its doors, collected of this collateral the sum of $16,765, remitted to the Hanover Bank on account, $10,000, and retained the balance of $6,765, which was commingled with the assets of defendant bank. It further appears that of this collateral forwarded to the defendant there were renewals taken by the defendant to the amount of $9,100, which were not returned to the Hanover Bank, but hypothecated with the Atlantic Bank & Trust Company at Greensboro, N. C., as collateral for money loaned to defendant. The report of the receiver in effect ruled that there was no trust existent giving to the Hanover Bank a preferred claim on the assets, but said bank was only a general creditor to the amount of its debt and the assets so collected. On exception, this position was overruled by his Honor, who entered judgment declaring that said Hanover Bank was a preferred creditor to the amount of the $6,765 balance of the amount collected from the collateral, and also to the extent of the $9,100 renewals, with interest, etc. The judgment making such disposition of the matter closing as follows:

"The court reserves any ruling upon or consideration of the report of said receiver except such questions as are adjudicated herein, and continues without prejudice the motion of the receiver that its report be now further considered."

From this judgment the receiver of the Farmers Bank & Trust Company appealed.

Dickinson & Freeman for Hanover National Bank.
Dawson, Manning & Wallace for J. G. Dawson, receiver.

HOKE, J. From a perusal of the present record, it is clear that the appeal has been prematurely taken, and under the decisions applicable the same must be dismissed without prejudice to the rights of the parties in the premises. *Cement Co. v. Phillips*, 182 N. C., 437; *Beck v. Bank*, 157 N. C., 105; *Pritchard v. Spring Co.*, 151 N. C., 249.

In *Cement Co. v. Phillips, supra,* the position is strongly stated, and supported by numerous authorities, and in *Pritchard's case, supra,* an action to wind up the affairs of an insolvent corporation, judgment had been entered disposing of exceptions to report, and making distribution of part of assets, but such judgment not making final disposition of the matter, the appeal was dismissed. Speaking to the question in that case, the Court said:

"In this condition of the record, and on the facts indicated, the Court is of opinion that the appeal has been prematurely taken, and that the same must be dismissed without prejudice. It has been the uniform ruling of this Court that when a reference has been entered upon, it must proceed to its proper conclusion, and that an appeal will only lie from a final judgment or one in its nature final. *Brown v. Nimocks*, 126 N. C., 808; *Driller Co. v. Worth*, 117 N. C., 515, and *Haley v. Gray*, 93 N. C., 195.

"If a departure from this procedure is allowed in one case, it could be insisted upon in another, and each claimant, conceiving himself aggrieved, could bring the cause here for consideration, and litigation of this character would be indefinitely prolonged, costs unduly enhanced, and the seemly and proper disposition of causes prevented."

There being only an excerpt from the receiver's report, with no evidence or facts except as relevant to the claim of the Hanover National Bank and no entries showing what claims were presented, we are not in a position to act definitely upon the question, but consider it not improper to intimate that as now advised, it would seem to be necessary to a proper disposition of the questions involved in this litigation that the Atlantic Bank & Trust Company of Greensboro be formally made party to the proceedings. And that the report should disclose the amount of indebtedness of defendant to the Hanover National Bank, together with the entire amount, and as near as may be the value of all the collateral held by said Hanover Bank, as security for said indebtedness.

Appeal dismissed.

K. A. MERRILL v. J. J. TEW.

(Filed 15 March, 1922.)

1. Contracts—Vendor and Purchaser—Breach—Evidence—Questions for Jury—Trials.

In the vendor's action to recover the difference between the contract price of a carload shipment of potatoes and that obtained after he had taken possession and sold them to others upon the breach by the purchaser in refusing to accept the shipment, where the evidence is conflicting, a charge of the court making the defendant's liability to depend upon whether he had refused the shipment without just or legal cause is not erroneous.

2. **Same—Inspection—Resale by Vendor—Damages.**

In an action by the vendor of a carload of potatoes for its purchase price arising from the wrongful refusal of the defendant to receive it upon alleged breach of contract, the exception of defendant that the potatoes were to be inspected before the contract should become binding cannot be maintained on appeal, when, under the charge of the court and the evidence, the jury have found against his contention.

3. **Evidence—Character—General Reputation—Vendor and Purchaser.**

Where the purchaser has been sued for breach of his contract in wrongfully refusing to accept a carload of potatoes from the delivering carrier, and offers evidence tending to show that the potatoes were inferior in quality to those he had purchased, his character or reputation as a dealer in potatoes is properly excluded, and when he has testified in his own behalf, only his character by general reputation may be shown.

4. **Contracts—Breach—Vendor and Purchaser—Damages—Resale.**

Where the defendant has breached his contract in not receiving a carload of potatoes from the delivering carrier, and the purchaser has taken possession for the purpose of selling them, he is only required to take due precaution to prevent damage to the purchaser in disposing of the shipment to others, or not to increase them beyond those that would naturally and reasonably result from the purchaser's breach, and which were within the contemplation of the parties in making the contract.

5. **Same—Place of Resale.**

Where the purchaser has breached his contract in refusing to accept from the seller a shipment of potatoes, and the seller has sold them to others, in the exercise of reasonable care, skill, and prudence, the purchaser's contention that they should have been sold on his local market, and not sent to New York for the purpose, is untenable when the contract is silent on the subject, and it appears that it was not intended to be sold in the local market, but to be shipped beyond that point.

APPEAL by defendant from *Lyon, J.*, at the October Term, 1921, of CARTERET.

The plaintiff alleges that he sold to the defendant, and that the defendant purchased from him, a carload of potatoes about the first of June, 1919. That the car contained 210 barrels at $7.10 a barrel. That the potatoes were primes or No. 1's, that he raised eighty barrels himself, and bought from Dickinson one hundred and ten barrels, and from Springle twenty barrels, paying them $7 per barrel, to enable him to carry out his contract with the defendant. He alleges that he carried out his contract with the defendant. That these potatoes were inspected by the local inspector and placed upon the car as directed by the defendant.

The defendant, as plaintiff alleges, refused to accept the potatoes according to the contract, and after an attempt by the plaintiff to sell the potatoes on the local market, which he failed to do, he consigned the shipment, through Mr. Gibbs, to Phillips & Sons, commission merchants, in New York, and received for them the sum of $693.58. This action is brought to recover the difference between the contract price for the potatoes and the actual amount the plaintiff received for the 210 barrels, when he sold them on the market.

The jury returned a verdict in favor of plaintiff, and in response to the issues submitted to them as follows:

"1. Did the plaintiff and defendant contract, as alleged in the complaint? Answer: 'Yes.'

"2. Did defendant break said contract? Answer: 'Yes.'

"3. What damage, if any, is plaintiff entitled to recover? Answer: '$776.42, we mean the difference between what the potatoes sold for and $7 per barrel.'"

Judgment was entered accordingly, and defendant appealed.

C. R. Wheatly for plaintiff.

H. L. Stevens and M. Leslie Davis for defendant.

WALKER, J. The foregoing statement sets forth the main features of the controversy.

There was evidence that the defendant did not refuse to take the potatoes until just after he had received and read a telegram from New York indicating that the market had declined or was "going off." The plaintiff testified that the defendant had told him to load the potatoes on the car, and he would come to the railroad station and pay for them, but refused them after he had read the telegram. The defendant, on the contrary, testified that he had examined the lot of potatoes as well as he could under the circumstances and found them "off grade," and not such as were sold to him. The carload consisted of some potatoes which plaintiff had grown himself and two or more lots he had purchased from others at $7 per barrel to complete the shipment of 210 barrels, and plaintiff further testified that they were "No. 1 primes," that is, of the kind and quality he agreed to sell to the defendant; that he had complied with the contract in all respects, and that the defendant rejected the potatoes without any just or lawful excuse, but simply because he had learned by the telegram that the price was falling in the potato market at New York.

Upon this, and other relevant evidence, the Court instructed the jury very broadly for the defendant. The court told the jury that "if they found from the evidence that the two hundred and ten barrels of potatoes were delivered according to the contract made between plaintiff and defendant (if you find they made such a contract), and you further find that the defendant refused to pay for the potatoes, it will be your duty to answer the first issue 'Yes.' But if the potatoes were not according to contract, why, then, the defendant was not bound to receive them—if there was not 90 per cent of them No. 1 potatoes, as contracted for, there would be no breach of contract by defendant, but if you find that the potatoes, and all of them, the two hundred and ten barrels were 90 per cent No. 1 prime potatoes, as they were required to be, and that the defendant refused them for no other reason than that the market had declined, then you would answer the second issue 'Yes.'" This charge placed the real issue between the parties squarely upon its merits, as it was only a question as to which party had testified truthfully about the matter, and the charge responded fully to the defendant's requests for instructions, and, at least, substantially so.

The plaintiff further testified that there were two barrels in the car which were put in there by mistake and were afterwards taken out, and that defendant was not charged for them, and that there were delivered to the defendant 210 barrels of good potatoes, such as were described in the contract, and that there was no reason, or excuse, for him to refuse to take them.

It further appears in evidence that there was no stipulation that the potatoes should be first inspected before the contract was complete, but the jury found otherwise, as the court charged them that if inspection was required by the defendant before the contract should become binding, the jury would answer the first issue "No," and they answered it "Yes."

The testimony concerning Mr. Tew's representation "as to his dealings in potatoes" was properly excluded. His character, or reputation, was not involved in the issue, and the question was therefore incompetent. *McRae v. Lilly,* 23 N. C., 118, at 120; *Heileg v. Dumas,* 65 N. C., 214, at 215; *Marcom v. Adams,* 122 N. C., 222; *Fowler v. Ins. Co.,* 6 Cowan (N. Y.), 73. It was competent to prove Mr. Tew's character by general reputation. Speaking of evidence such as was offered in this case, in a civil action, it has been said that "if such evidence is proper, then a person may screen himself from the punishment due to fraudulent conduct, till his character becomes bad. Such a rule of evidence would be extremely dangerous. Every man must be answerable for every improper act, and the character of every transaction must be ascertained by its own circumstances, and not by the character of the parties." And to the same effect is *Thompson v. Bowie,* 4 Wallace (U. S.), 470.

Upon the question of damages the charge could not have been conceivably more favorable to the defendant. He had unjustly and illegally repudiated his contract, as the jury have said, and his Honor required the jury to find that the defendant had not only resold the potatoes, in the exercise of ordinary prudence and reasonable care, and with proper regard for the defendant's interests, but that he had taken due precaution to prevent damage, or any increase of damage, beyond that which naturally and reasonably resulted from the breach of the contract, and was within the contemplation of the parties. The court further charged upon the damages that if there was a breach of the contract by the defendant, and the plaintiff kept possession of the potatoes in order to sell them for defendant's account, he was bound to do so with reasonable care, skill, and prudence, and if he put them in the market for sale, in the exercise of ordinary care and diligence, he would be entitled to recover the difference between the contract price and the market price, or what by reasonable and proper effort he was able to realize from a sale of the potatoes in open market.

The defendant contends that they should have been sold in Beaufort, where they were delivered to the defendant, but the evidence does not show that they were delivered there with any agreement or understanding that they should remain there or be sold in that place; on the contrary, what evidence there is bearing on this question tends to show that they were intended to be shipped beyond Beaufort for sale, and presumably in New York, which market evidently controlled prices in the locality of Beaufort.

The jury have found that the defendant broke the contract between him and the plaintiff for the sale and purchase of the potatoes, and his purpose now is to cast all of the risk of any loss by a resale upon the plaintiff, assuming none of it himself, though his own breach of the contract brought about the necessity for the sale. The plaintiff testified that he could not sell the potatoes advantageously in Beaufort, where the market price responding to that generally had declined, so that, being already loaded in the car for the purpose, they were shipped to New York and placed in the care of his commission merchant, or broker, for resale, and the jury have found that in this respect the plaintiff exercised proper care and diligence in putting them on the best market, as soon as possible, and in selling them. The resale was fair, made in good faith, and in a mode best calculated to produce the real value of the goods, or the best price fairly and reasonably obtainable by the proper observance of the general usages of trade and a compliance with the general requisites of a resale, which should measure the rights and injuries of the parties. *Sawyer v. Dean,* 114 N. Y., 467; 24 R. C. L., secs. 379 and 380. If the plaintiff resold the goods for his own account or benefit, the evidence tends to prove that he acted prudently and with perfect good faith, and otherwise conducted himself throughout the transaction in compliance with the custom of the trade in such matters, and for the best advantage of the defendant, the defaulting buyer, keeping the resultant damages within proper bounds.

The case was correctly tried, and defendant has no just or legal ground for complaint.

No error.

SALLIE B. PIERCE v. HENRY E. FAISON, EXECUTOR, ET AL.

(Filed 15 March, 1922.)

1. Executors and Administrators—Account and Settlement—Actions.

In this action for an accounting and final settlement by an executor: *Held*, a statement of account of debts and credits filed by the executor was not in the form of a regular final account, and further, the matters alleged were not more than an unfulfilled promise for a final settlement, and insufficient according to the requirements of the law as a final account.

2. Same.

Where an executor or administrator fails to file his final account for two years after his appointment, the law makes the demand for those entitled to the estate, and at the end of this period an action will lie at the instance of any one interested to have the executor or administrator account in settlement of the estate.

3. Same—Limitation of Actions.

Where a person is interested as distributee or beneficiary in the estate of a deceased person, and fails to bring his action against the personal representative for ten years, his right of action is barred ten years from the expiration of the two years period in which he has failed to file his final account, as the law provided.

4. Same—Statutes—Interpretation.

The statute barring the right of one having an interest in the estate of a deceased person after ten years, enacted by Laws 1891, ch. 113, repealing sec. 136 of The Code, applies to the right to an accounting by the executor or administrator, where the right existed theretofore, and the period prescribed by the statute has since run.

5. Same—Pleadings—Answer.

Where those having an interest in the estate of a deceased person have failed to bring an action for an accounting and settlement within the period allowed by the statute of limitations, objection by the personal representatives can only be taken by answer.

6. Same—Trusts.

Where the answer of the personal representatives of a deceased person have unsuccessfully pleaded the statute of limitations in an action for an accounting and settlement with those having an interest in the estate of the deceased, the defendant is liable to an accounting for any trust funds in his hands, not thus barred.

7. Same—Burden of Proof.

The plaintiff having an interest in the estate of a deceased person has the burden of showing that the statute of limitations has not run in his action for an accounting and final settlement, when such statute is pleaded in the answer.

8. Same—Interpretation of Pleadings.

The answer of the personal representative of a deceased person will be liberally construed in his favor to ascertain whether he has sufficiently pleaded the statute of limitations to an action brought against him for a final accounting and settlement of the estate of the deceased: *Held*, that the plea was sufficient in this case.

9. Same—Issues—Questions for Jury—Trials.

Where the answer, in an action against the personal representative of a deceased, is sufficient to raise the plea of the statute of limitations, a question of fact is raised for the jury to determine.

10. Executors and Administrators—Account and Settlement—Limitation of Actions—Statutes.

C. S., 445, limiting the time for the bringing of an action to ten years, and applying to an action against an executor or administrator for a final accounting and settlement, is not affected by the provisions of C. S., 395, as to actions on their official bonds.

APPEAL by defendant from *Devin, J.*, at the September Term, 1921, of DUPLIN.

This action was brought in the court below for an account and final settlement with Henry E. Faison, executor of Henry W. Faison, deceased, but is described by the plaintiff as a suit to surcharge and falsify his accounts. It is alleged that Henry W. Faison died in December, 1885, leaving a will, which was duly admitted to probate, and the two executors named therein, Henry E. Faison and Martha W. Faison, duly qualified as such in January, 1886.

It is stated that no regular accounts were filed by Henry E. Faison and Martha W. Faison as executor and executrix, the latter having died in 1910. It appears in the record that in response to a citation issued by the clerk of the Superior Court of Duplin County the defendant H. E. Faison, as surviving executor, filed what purports to be an account of debits and credits, and showing "a balance due by the executors of $4,516, but this paper is not in the form of a regular final account, but is more of a memorandum of the items of debit and credit, and could hardly be called a final account as the law requires to be filed.

The defendant pleaded what is termed "a final account and settlement" with the plaintiff and the other parties interested in the estate. The defendant Henry E. Faison, executor, alleges that he and the plaintiff and the others entitled to an interest in the estate came to a settlement in regard to the same, and it was agreed finally that the plaintiff owed at least a balance of $2,000 to the estate, or that much more than her share thereof, which sum of $2,000 it was agreed should be paid by plaintiff to the executor, for the younger children to whom it was due, in final settlement, which was not done until a judgment was rendered at February Term, 1914, of Duplin Superior Court, affirmed in the Supreme Court, on appeal, 21 October, 1914, when the sum of $2,000, with accrued interest, amounting to $3,800, was paid into the office of the clerk of the Superior Court to await the final determination of this action, and upon his filing a bond for the same, the said money was paid over to Henry E. Faison as executor, who, as plaintiff alleges, paid the same over to William Faison, Percy Faison, and Winnifred Faison, but plaintiff alleges that this was wrongful and unlawful, which the defendant executor denies.

The court declined to submit the following issues upon the two pleas:

"1. Was there a settlement between the executor and plaintiff at the time she bid off the lands at $2,000, that the balance of the debts due on said judgment should not be collected, and that in consideration of this settlement it was agreed that she had received her full share of the personal estate, and that the $2,000 due on the land sale should be paid over to the minor children, as alleged in the answer?

"2. Is the plaintiff's cause of action barred by statute of limitations?"

Defendant H. E. Faison, executor, appealed.

Stevens, Beasley & Stevens for plaintiff.
H. D. Williams and G. R. Ward for defendant.

WALKER, J., after stating relevant matters, as above: The facts are so indefinitely stated in the pleadings that it is difficult, if not impossible, to arrive at any just or accurate conception of the merits of this case. It does not seem, from the slight information we can gather from the pleadings, that there has been any formal and final settlement between the defendant and those interested in the estate. It was nothing more than a promise on the part of the plaintiff to do something which it is alleged by the defendant, she failed to do, and hardly more than a negotiation for a settlement. His Honor, therefore, ruled correctly as to the plea of a final settlement.

As to the statute of limitations: We are not so clear as to this plea, because the facts are so meagerly stated. We said, by the *Chief Justice,* in *Brown v. Wilson,* 174 N. C., 668, at 670, quoting from *Edwards v. Lemmond,* 136 N. C., 330: "At the end of two years the law makes the demand and puts an end to the express trust, though no express demand is made by any party interested upon the executor or administrator. He is in default, and an action will lie at the end of the two years at the instance of any one entitled to have an account in settlement of the estate. *Self v. Shugart.* 135 N. C., at bottom of page 194. It is familiar learning that the statute begins to run whenever the party becomes liable to an action if the plaintiff is under no disability. *Eller v. Church,* 121 N. C., 269. There having been no action begun within ten years, during which actions could have been brought, this action is barred by The Code, sec. 158. *Hunt v. Wheeler,* 116 N. C., 424. In

Wyrick v. Wyrick, 106 N. C., 84, this was intimated and was reaffirmed in *Kennedy v. Cromwell,* 108 N. C., 1. *Grant v. Hughes,* 94 N. C., 231, and *Bushee v. Surles,* 77 N. C., 62, relied on by the plaintiff, were both cases where the original administration began under the law prior to The Code, as is stated by *Davis, J.,* in *Woody v. Brooks,* 102 N. C., 344. The same is true of *Phifer v. Berry,* 110 N. C., 463. At that time such actions were governed by the former law. The Code, sec. 136; *Brittain v. Dickson,* 104 N. C., 547. But section 136 has been repealed by Laws 1891, ch. 113, and the statute of limitations prescribed by The Code is applicable to this case, though original administration was taken out in 1866."

The right of action for legacies and distributive shares, or to have an accounting with an executor and a settlement, accrues two years from his qualification. Rev., secs. 144 and 147. The executor is required to distribute and pay over the assets to those entitled thereto at that time, and if he fails to do so, they may sue for the same. Rev., sec. 360, ch. 12, provides that civil actions can only be commenced within the periods prescribed in this chapter, after the cause of action shall have accrued, except where in special cases a different limitation is prescribed by statute. But the objection that the action was not commenced within the time limited can only be taken by answer. The Code, sec. 138; C. C. P., sec. 17. It was upon those sections that the cases above cited were decided. Whether the statute of limitations bars this action we cannot decide until we know all the facts, which are not now before us. It may be that it is not barred, and that defendant is liable to account for any trust funds in his hands, but he says that there are none such, as he had fully accounted for them and paid them over to the proper persons entitled to receive them.

It is well settled by us that when the statute is pleaded, the burden is then upon the plaintiff, or party against whom it is set up, to show that his action was commenced within the time limited by the law, and not upon the defendant, or the one who pleaded it, to show the contrary. *House v. Arnold,* 122 N. C., 220; *Houston v. Thornton, ibid.,* 365; *Hooker v. Worthington,* 134 N. C., 283, at 285; *Gupton v. Hawkins,* 126 N. C., 81; *Sprinkle v. Sprinkle,* 159 N. C., 81; *Ditmore v. Rexford,* 165 N. C., 620. This being so, it was not proper to deny the plea without a trial. It may be admitted, however, that if defendant, as executor, has any of the trust funds in his hands and plaintiff shows that her action was brought in time, he will have to account for them. But it is to be fairly inferred from his answer that there are none now in his possession, he having fully accounted for them. But the evidence will reveal the true state of the case, and until it, or proper findings of the facts are before us, we are unable to say what is the executor's liability, if any, and if any, how much. We are required to give the defendant's answer a liberal and favorable construction, for the purpose of ascertaining its meaning, though informally expressed (*Blackmore v. Winders,* 144 N. C., 215; *Brewer v. Wynne,* 154 N. C., 467), and thus considered, it raises an issue as to the statute of limitations, with the burden upon the plaintiff to show that she is not barred. If not barred, she will be entitled to have the referee proceed, under the order of the court, to take and state the account, with his conclusions of fact and law.

It may well be added that C. S., 439, subsec. 2 (Rev., sec. 393), and C. S., 441, subsec. 6 (Rev., sec. 395), relate to actions against executors, administrators, etc., on their official bonds, and not against an executor, administrator, etc., for a simple account and settlement. Defendant is relying, in this case, as we infer, on C. S., 445 (Rev., sec. 399; C. C. P., sec. 37), and the other statutes specially mentioned in his answer.

There was error on the plea of the statute of limitations, and, as to that plea a new trial is ordered.

New trial.

E. B. CAPPS, ADMINISTRATOR, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 22 March, 1922.)

1. **Railroads—Employer and Employee—Commerce—Federal Employers' Liability Act.**

In an action to recover for the wrongful death of the plaintiff's intestate under the Federal Employers' Liability Act, it must be alleged and shown that the intestate, when the injury occurred causing his death, was engaged in the course of his employment in doing some act in relation to interstate commerce, as well as that his employer was also therein engaged with regard to the subject-matter of the action.

2. **Same—Statutes—Courts—Conflict of Laws—Jurisdiction.**

The Federal Employers' Liability Act, in its application to a recovery of damages of a railroad company for a wrongful death, operates in relation to interstate commerce, while a State statute, not in accordance therewith, operates in relation in intrastate commerce, the jurisdiction of each being exclusive in its respective field.

3. **Same — Pleadings—Amendments—Actions—Conditions—Precedent—Limitation of Actions.**

Where a State statute gives a right of action to the personal representatives of the intestate against a railroad company, for a wrongful death not existing either under the common law or the Federal Employer's Liability Act, upon the express condition that action be commenced within twelve months therefrom, the lapse of the statutory time not only bars the remedy but destroys the liability: and where the plaintiff has erroneously alleged a cause of action under the Federal statute alone, and attempts, after the expiration of the twelve months, by amendment, to set up a cause under the State law, the amendment will not relate back to the commencement of the action, but will be regarded in effect as a new and independent cause, the right to which the plaintiff has lost by his delay.

4. **Pleadings—Amendments—Actions—Statutes—Limitation of Actions.**

The principle by which a new cause of action may be introduced by amendment to the original complaint must be construed in connection with the right of the defendant to plead the statute of limitations, where the amendment in question amounts to a departure in pleading.

5. **Railroads—Employer and Employee—Master and Servant—Federal Employers' Liability Act—Statutes—Wrongful Death—Limitation of Actions—Conditions Precedent.**

A statute of Virginia gave a special right of recovery against a railroad for wrongful death upon condition of bringing action in twelve months, or upon action brought and terminating without adjudication of its merits, it required the plaintiff to bring his second action within whatever balance of the period that may then remain of the stated time. In plaintiff's action in our courts, an amendment under defendant's objection was allowed plaintiff to his original cause laid under the Federal Employers' Liability Act, thereafter removed to the Federal Court, which held the plaintiff, not having brought his action in twelve months, had lost his right under the Virginia statute, and further holding that the cause did not lie under the Federal law. Plaintiff then took a voluntary nonsuit, and within twelve months brought his action in our State court solely under the Virginia statute, whereunder the cause thereof had arisen: *Held*, by the voluntary nonsuit, and the lapse of time, plaintiff's right under the statute sued on had been lost by him. The construction of the Virginia courts of the statute in question is applied herein.

CLARK, C. J., dissenting.

APPEAL by defendant from *Allen, J.*, at November Term, 1921, of WILSON.

Civil action to recover damages for an alleged negligent injury and wrongful killing. From a verdict and judgment in favor of plaintiff, the defendant appealed.

O. P. Dickinson for plaintiff.
F. S. Spruill and Carl H. Davis for defendant.

STACY, J. The following statement of the case will suffice for our present decision:

The plaintiff's intestate, I. M. Williamson, was employed as a carpenter by the Atlantic Coast Line Railroad Company, and on 16 August, 1915, "while making investigation as to how to repair a section of the steps of a coal chute" at South Richmond, Va., he received injuries from which he died three days thereafter, 19 August.

On 15 May, 1916, plaintiff instituted suit in the Superior Court of Wilson County, North Carolina. Complaint was duly filed, specifically setting up a cause of action based on the Federal Employers' Liability Act, and alleging that, at the time of the injury, both the plaintiff's intestate and the Atlantic Coast Line Railroad Company were engaged in interstate commerce. The defendant answered, denying liability, and further alleging that plaintiff's intestate, while in its employ, was not engaged in any work of interstate commerce. In deference to this denial and allegation, the plaintiff thereafter, on 28 June, 1917, more than twenty-two months after the death of the decedent, upon motion and over defendant's objection, was permitted to set up, by way of amendment to the original complaint, an additional or new cause of action, based on a statute of the State of Virginia, giving a right of action for wrongful death. Upon motion of defendant, the case was then removed to the District Court of the United States for the Eastern District of North Carolina; and thereafter, in said District Court, the defendant answered, setting up that the cause of action based on the Virginia law had expired by the very terms of the Virginia statute, since the complaint showed on its face that plaintiff's intestate died on 19 August, 1915, more than twelve months prior to the filing of said amendment. The act invoked and upon which the amendment is based provides that "Every such action shall be brought by and in the name of the personal representative of such deceased person, and in twelve months after his or her death." Pollard's Code of Virginia, 1904, sec. 2903.

It was held in the Federal District Court that the complaint had set out two causes of action: one based on the Federal Employers' Liability Act and the other on the statute of the State of Virginia; and further, that the latter cause of action had not been instituted within twelve months after decedent's death, and was therefore barred by the Virginia statute. The plaintiff then, and in said District Court of the United States, on 11 June, 1918, suffered a voluntary nonsuit upon the cause of action based on the Virginia statute. The original cause was then remanded to the Superior Court of Wilson County for trial.

Thereafter, on 12 May, 1919, within twelve months after the judgment of nonsuit in the United States District Court, as above set out, and while the original suit was still pending, the plaintiff issued a new summons against the defendant herein, and on 25 June, 1919, following, filed his complaint setting out two causes of action in identically the same language as that used in the complaint and amendment thereto filed in the original suit. The defendant, on 20 February, 1920, filed answer to the complaint in this second action, but made no objection to the plaintiff prosecuting two separate and independent suits in the same court at the same time with pleadings exactly alike.

At the Fall Term, 1919, of Wilson Superior Court, the original suit, based on the Federal Employers' Liability Act, was called for trial. A judgment as of nonsuit was entered upon the ground that plaintiff himself was not engaged in work of the character of interstate commerce at the time of his injury. This was affirmed on appeal, and is reported in 178 N. C., 558. The plaintiff then applied to the Supreme Court of the United States for a writ of *certiorari* to have said judgment reviewed, which said writ was denied in the summer of 1920.

Subsequently, at the May Term, 1921, of Wilson Superior Court, the case at bar was called for trial; and the defendant's plea in bar and motion to dismiss were overruled; from which ruling the defendant appealed to this Court, but said appeal was dismissed as premature. *Capps v. R. R.,* 182 N. C., 758.

Finally, at the November Term, 1921, of Wilson Superior Court, this case again came on for trial, and was heard before his Honor, Allen, J., and a jury. Upon motion of the defendant, his Honor dismissed the cause of action based on the Federal Employers' Liability Act, for that all the matters and things therein set out and complained of had been fully adjudicated and previously determined. The defendant also moved to dismiss plaintiff's second cause of action, based on the Virginia statute, upon the ground that the same had not been set up or begun within one year from the death of plaintiff's intestate, and that the action could not, therefore, be maintained. This motion was overruled, and the cause submitted to a jury, which resulted in a verdict for the plaintiff. From the judgment rendered thereon, defendant appealed.

The theory upon which his Honor below allowed a recovery herein is set out in the judgment of the Superior Court as follows:

"The defendant, in apt time, renewed its motion heretofore made to dismiss the complaint as to the second cause of action, which is laid under the statutes of the State of Virginia, as appears in the complaint, for that the said second cause of action is a new cause of action, and not a mere amendment to the original complaint, and that the same not having been filed within one year after the death of decedent, is barred by the statute. The court overruled this motion, holding as a matter of law that the cause of action set out in the three pleadings of the plaintiff, viz., the original complaint filed in the first suit, the alleged amendment thereto, and the complaint filed in the second suit, is one and the same, and submitted the issues to the jury upon the second cause of action. The defendant duly excepted."

The complaint in the first suit was based on the Federal Employers' Liability Act. The amendment to the complaint, filed in that proceeding, set up a cause of action based on the Virginia law. The judge of the United States Court, ruling on defendant's plea in bar, held that the cause of action, based on the Virginia statute, had not been instituted within twelve months after decedent's death, and hence was barred by the limitation contained in the statute under which it was brought. After this ruling, the first suit proceeded to final judgment without further amendment, and resulted in a judgment of nonsuit, as heretofore noted.

The present suit, as shown by the record, was instituted 12 May, 1919, more than three years after Williamson's death. Speaking to the question as to when suit must be brought, under the Virginia statute, the Supreme Court of that State, in *Dowell v. Cox* (Va.), 62 S. E., 272, held: "That when the declaration in an action for death by wrongful act shows on its face that the death occurred more than twelve months before action brought, advantage may be taken of the limitation by demurrer. This conclusion is clearly correct, because, in such cases, the limitation affects the right as well as the remedy." And to like effect is the holding of the same Court in *Manuel v. Norfolk & W. Ry. Co.,* 99 Va., 188. Our own decisions, dealing with a similar statute, are in full accord with the doctrine announced in the Virginia cases. In *Taylor v. Iron Co.,* 94 N. C., 525, referring to the limitation contained in the North Carolina statute which allows a recovery for wrongful death, it was said: "This is not strictly a statute of limitation. It gives a right of action that would not otherwise exist, and the action to enforce it must be brought within one year after the death of the testator or intestate, else the right of action will be lost. It must be accepted in all respects as the statute gives it."

The cause of action sought to be enforced in this proceeding was not known at the common law. It was essential, therefore, that it should be based on some applicable statute. There was a Virginia statute on the subject, and also the Federal Employers' Liability Act. But these two laws dealt with different kinds of commerce, and occupied different though contiguous spheres. *St. Louis, etc., R. Co. v. Seale,* 229 U. S., 156. If the Federal statute were applicable, the State statute was excluded by reason of the supremacy of the former law. *Michigan C. R. Co. v. Vreeland,* 227 U. S., 59; *Renn v. R. R.,* 170 N. C., 128, and cases there cited. "Had the injury occurred in interstate commerce, as was alleged, the Federal act undoubtedly would have been controlling, and a recovery could not have been had under the common or statute law of the State; in other words, the Federal act would have been exclusive in its operation, not merely cumulative." *Wabash R. Co. v. Hayes,* 234 U. S., 86. Conversely, if the State statute were applicable, the Federal law was not pertinent. *Mondou v. R. R.,* 223 U. S., 1. "There can be no doubt that a right of recovery under the Federal act arises only where the injury is suffered while the carrier is engaged in interstate commerce and while the employee is employed by the carrier in such commerce." *R. R. v. Behrens,* 233 U. S., 473. The two statutes, Federal and State, operated in different fields, the one in interstate commerce and the other in intrastate commerce, and each was controlling and exclusive in its respective field of operation. The plaintiff, at first, elected to sue under the Federal Employers' Liability Act, and specifically alleged a cause of action arising thereunder. He failed to prove his case as laid in interstate commerce. *Capps v. R. R.,* 178 N. C., 558. His second cause of action, based on the Virginia statute, was not pleaded or set up until more than twenty-two months after the death of his intestate. This right of action was therefore barred at that time, or rather lost, as it did not extend beyond the period fixed in the statute. *Phillips v. Grand Trunk, etc., Co.,* 236 U. S., 662.

"There can, of course, be no doubt of the general principle that matters respecting the remedy—such as the form of the action, sufficiency of the pleadings, rules of evidence, and the statute of limitations—depend upon the law of the place where the suit is brought. But matters of substance and matters of procedure must not be confounded because they happen to have the same name. For example, the time within which a suit is brought is treated as pertaining to the remedy. But this is not so, if by the statute giving the cause of action, the lapse of time not only bars the remedy, but destroys the liability." *Central Vermont Ry. Co. v. White,* 238 U. S., 507.

It follows, therefore, that under the Virginia law, suit must be brought within one year from the death, or else the liability and right of action cease to exist, and this was not done in the case at bar. *Dowell v. Cox, supra.*

But passing over, for the present, any question as to whether plaintiff had the right to institute this action while another suit between the same parties and arising out of the same inquiry (if it be "one and the same" cause of action) was pending in the same court, the fact remains that the first reference made by plaintiff to the Virginia statute in any complaint, or amendment thereto, was the amendment to the original complaint, which amendment was allowed, over defendant's objection, on 28 June, 1917, more than twelve months after the death of Williamson. Hence, on 28 June, 1917, when plaintiff for the first time set up an action under the Virginia statute, by the terms of which alone he could proceed, he was too late by more than ten months.

Clearly, there were two causes of action set up and alleged by the plaintiff. A change from the one to the other not only involved a change from fact to fact—from interstate to intrastate commerce—but also a change from law to law—from the Federal to the State statute. *Union Pac. R. Co. v. Wyler,* 158 U. S., 285. Thus the amendment filed in the original proceeding, alleged a new and independent cause of action, and was therefore a departure from the initial pleading. "A departure may be either in the substance of the action or defense, or the law on which it is founded; as if a declaration be founded on the common law, and the replication attempt to maintain it by a special custom, or act of Parliament." 1 Chitty on Pleading, pp. 674, 675.

It is the general rule, and consistently held with us, that a new cause of action may be introduced by way of amendment to the original pleadings; but the established limitation on the operation of its relation to the commencement of the suit is that if the amendment introduce a new matter, or a cause of action different from the one first propounded, and with respect to which the statute of limitations would then operate as a bar, such defense or plea will have the same force and effect as if the amendment were a new and independent suit. *King v. R. R.,* 176 N. C., 301; *Belch v. R. R.,* 176 N. C., 22; *McLaughlin v. R. R.,* 174 N. C., 182; *R. R. v. Dill,* 171 N. C., 176, and cases there cited; *Deligny v. Furniture Co.,* 170 N. C., 197; *Fleming v. R. R.,* 160 N. C., 196, and *Union Pac. Ry. Co. v. Wyler, supra.*

The case of *Mitchell v. Talley,* 182 N. C., 683, contains nothing which would tend to militate against our present decision. The question there presented was whether an attachment would lie in an action for injury to the person resulting in death. We held that it would, under the broad and comprehensive terms of the sections of the Consolidated Statutes relating to attachments. The two cases are scarcely related; they are easily distinguishable.

But conceding, for the sake of argument, that by eliminating or treating as surplusage the allegation touching the subject of interstate commerce in the original complaint, and holding that, without this allegation, it may be considered as containing a defective statement of a good cause of action under the Virginia law, subject to be cured by amendment, under authority of *Lassiter v. R. R.,* 136 N. C., 89; yet, even in this event, the plaintiff is confronted with an insurmountable obstacle under the terms of the Virginia statute with respect to the institution of a second suit after the abatement or dismissal, without a determination of the merits of the previous action. In this respect, the Virginia law is different from the law of North Carolina. Sec. 2903, Pollard's Code of Virginia, already mentioned, further provides: "But if any such action is brought within said period of twelve months after said party's death, and for any cause abates or is dismissed without determining the merits of said action, the time said action is pending shall not be counted as any part of said period of twelve months, and another suit may be brought within the remaining period of said twelve months as if such former suit had not been instituted."

It will be noted that, under the terms of this statute, the plaintiff is not given twelve months after the abatement or dismissal, without a determination of the merits of the first suit, within which to bring his second action, but only the remaining period of the twelve months which had not elapsed prior to the filing of the first suit; or, in other words, the time during which the first suit is pending is not to be counted in determining the period of twelve months from the date of decedent's death. This being the correct interpretation of the Virginia law, as declared by the Supreme Court of that State, it will be observed that the plaintiff did not start his first suit until nearly nine months after the death of his intestate. Then, on 11 June, 1918, he voluntarily submitted to a judgment of nonsuit on his second cause of action, or the one set up under the Virginia statute. Regardless as to how we may treat the allegations of the original complaint, with respect to this cause of action, they were clearly withdrawn for any such purpose when the plaintiff was nonsuited upon his own motion. He then had only three months and three days within which to bring another suit—eight months and twenty-seven days having elapsed before the institution of the first suit; and his second action, which is the case at bar, was not instituted until 12 May, 1919, eleven months and a day after his voluntary nonsuit of the Virginia cause of action in the Federal Court. This was too late, as declared by the Supreme Court of Virginia in the case of *Manuel v. Norfolk & W. Ry. Co., supra.*

Applying the above principles to the facts of the instant case, we think it is clear that the plaintiff's recovery must be denied and the action dismissed. There appears to be no logical basis upon which it may be sustained.

Action dismissed.

CLARK, C. J., dissenting: The plaintiff's intestate was killed in South Richmond in the service of the defendant while repairing a coal chute that was used for coaling and sanding engines used in both interstate and intrastate commerce. Before the expiration of the year thereafter the plaintiff qualified as his administrator in Wilson County, N. C., and brought suit in the Superior Court of that county. In filing his complaint he alleged the remedy he sought to be under the Federal Employers' Liability Act. After 12 months had expired, upon permission of the court, he filed an amended complaint in which he reiterated the matters and things alleged in the original complaint, and, in addition, claimed the remedy under the Virginia statute. On motion of the defendant, the case was moved to the Federal Court, where a motion was made by defendant to dismiss the demand for the remedy alleged under the Virginia statute because more than 12 months had elapsed since the death of the plaintiff's intestate before filing the complaint. In the Federal Court it was held that the case was one that arose under the Federal act, but intimated that the additional remedy claimed in the amended complaint was barred by the statute of limitations. Thereupon the plaintiff submitted to a voluntary nonsuit as to that, and on his motion the cause was remanded to the State court to be tried under the Federal act.

In the State court the defendant renewed his motion to nonsuit the plaintiff on the ground that the plaintiff's intestate was not engaged in interstate commerce at the time of his death, and hence the action was not triable under the Federal act. The nonsuit was granted, and on appeal to the Supreme Court of North Carolina, this Court affirmed the decision of the lower court, and an application thereafter by the plaintiff to the Supreme Court of the United States for a writ of *certiorari* was denied. Immediately, however, after the case was remanded to the State court, the plaintiff, who had submitted to a nonsuit on his right of remedy under the Virginia statute, and before 12 months had expired, instituted a new suit in the Superior Court of Wilson. The defendant pleaded in bar, but this was overruled by Calvert, J., who held that the cause of action set out in the three pleadings, to wit: By the original complaint filed in the first suit; amendment thereto, and the complaint filed at the last suit were the same, and not two distinct causes of action. The defendant appealed, but at September term of this Court the appeal was dismissed as premature, and in the lower court the same plea was made at the October term of Wilson, before Allen, J., and overruled. The case was tried on its merits, and a verdict of $8,000 was awarded, and from the judgment the defendant appealed.

It would seem clear that the sole question is whether or not the cause of action set out in the three pleadings, to wit: The complaint filed in the first suit, seeking the remedy under the Federal Employers' Liability Act; the amendment adding to that action on the same facts a recovery under the remedy allowed under the Virginia act; and the complaint filed in the second action brought in Wilson were on the same cause of action. The cause of action is one and the same—the wrongful death, which occurred but once, and therefore under the identical circumstances and at the time set out in all three complaints. The jury have settled, upon the facts, that the death of plaintiff's intestate was caused by the wrongful act of the defendant, and that $8,000 is a just measure of compensation which should be awarded.

While the remedy which could be awarded for recovery under the Federal Employers' Liability Act and the remedy under the Virginia act may be somewhat different, the fact remains that there is and can be only one cause of action. Whether the plaintiff claimed a remedy under one act or the other, there was but one cause of action. It would follow, therefore, that when the amendment was allowed to set up a claim for the Virginia remedy, it was not another or different cause of action, but like a second count in a bill of indictment where the transaction is stated in a different form but in reference to the same offense.

When the plaintiff brought his action for the wrongful death, which was valid under the Virginia statute and under the Federal act, if in either a wrong remedy was asked it in no wise affected the statute of limitations of the cause of action. The proceedings in each was in a court having proper jurisdiction, and the subsequent addition, not of another cause of action, but of a claim for a somewhat different remedy, in no wise affected it.

If these were separate and distinct causes of action for the same wrong, then if the plaintiff—who could not guess in advance how the Court would hold—had sought to join them, the action would have been demurrable as multifarious. If he had brought two separate and distinct actions, then the defendant could have pleaded the pendency of two actions for the same transaction. This would be worse than the former system of pleading by which if a man did not guess as to what the Court might hold was the proper form of action he would go out of court again and again until he could guess the form of action which the judge might approve; or if he had brought his action at law when it should have been a suit in equity or *vice versa,* he would go out of court.

It seems, according to the present common-sense method of pleading, that the plaintiff, who is entitled to bring an action for the wrongful death of his intestate, instituted a proceeding setting out the facts thereof, and he was in court claiming compensation for that wrong regardless whether he asked for a remedy under the Federal act or under the Virginia statute.

It follows, therefore, that he having asked, upon the identical facts set out in the complaint, relief under the Federal act, he could amend by asking the additional remedy under the Virginia statute. He could not guess how the judge might view the legal remedy applicable, and therefore the plaintiff has been in court since issuing the first writ under both statutes which give a remedy for the same wrongful death, leaving it to the courts to decide whether it was under one statute or the other.

The amendment, setting up and claiming a remedy under the Virginia statute, was not a new cause of action, and dated back to the original summons.

It is true that the plaintiff subsequently took a nonsuit as to the assertion of a claim for the remedy afforded by the Virginia statute, but he instituted a new action within 12 months, and, therefore, having come into court within the time prescribed by the Virginia Court, he was authorized to bring this new action.

In *Lassiter v. R. R.,* 136 N. C., 89, this Court held, in an action to recover damages for the death of plaintiff's intestate by wrongful act in another state, where the complaint would state a good cause of action had the death occurred in the state of the forum, an amended complaint setting forth the statute of the foreign state, which was not done in the original, does not introduce a new cause of action, nor admit the bar of the statute of limitations prescribed by the foreign statute giving the right of action. Our Code provides that "permitting an amendment setting up additional facts does not add to or change the cause of action even when there was a failure to allege an essential fact, but merely gives power to amend by inserting other allegations material to the case." "The perfecting of the complaint to cure a defect in the complaint, even in material matters, is not changing the cause of action nor adding a new cause, but merely making a good cause out of that which was a defective statement of a cause of action because of the omission of material allegations." But this is not even that case. The facts were substantially the same as set out in all three instances, to the same tenor, and the only difference is as to what remedy the plaintiff asked or was entitled to receive whether under the Virginia statute or under the Federal Employers' Liability Act.

In *Lassiter v. R. R., supra,* the Court said: "The *subject* of an action is the thing, the wrongful act for which the damages are sought, the contract which is broken, the act which is sought to be restrained, the property of which recovery is asked. The *object* of an action is the relief demanded, the recovery of damages or the land or personalty sued for, the restraint or other relief demanded." In this case there is but one state of facts, therefore there is but one cause of action; and they have been pending in court since the first writ was issued, and against that no statute of limitations has run under either statute. The demand for the damages, the relief, has been pending since the first complaint was filed, and it can make no difference that at one time the relief under the Virginia statute was added, and that at another time it was withdrawn, because during all the time this state of facts has existed in court, which the jury has found to be true, that the plaintiff's intestate, under those circumstances, came to his wrongful death by the cause of the negligence of the defendant, and damages were asked to be assessed. Whether the particular form of relief should be granted under the Virginia statute, or under the Federal statute, there has been only *one cause* *of action* instituted. This was instituted within the statutory period, and has always been pending, and whether the relief sought was under one statute or the other, there has been no laches on the part of the plaintiff which entitled the defendant to go out of court without payment for the wrongful death that he has caused.

In the *Lassiter case* it is said: "The *cause* of action plus the *right* of action thereon constitute what our code styles a *good cause of action.*" The injuries complained of in the original complaint filed by the plaintiff, together with his right to sue thereon under the statute of Virginia, constitute a good cause of action, but since the allegation left out, to wit: pleading of the Virginia statute, it was simply a *defective statement* of a good cause of action, and not a good statement of a defective cause of action, and in such cases the courts have universally held that a complaint may be amended to cure a defective statement of a good cause of action, and in such cases the amendment relates back to the time of filing the original complaint."

In *Pelton v. R. R.*, (Iowa), 150 N. W., 236-243, approved since in U. S. Supreme Court, the Court held, in effect, that if the original complaint does not allege a cause of action under the Federal act, we are of the opinion that the court had the power to permit it to be amended by alleging that the defendant was employed in interstate commerce at the time of his injury."

In *Renn v. R. R.*, 170 N. C., 128, the Court cites from *R. R. v. Wulfe*, 226 U. S., 570, and says: "In that case Sallie C. Wulfe commenced an action in the U. S. Circuit Court in her individual capacity to recover damages for the death of her son, who was killed in Kansas, under a right of action provided by statute for injury resulting in death. The defendant was engaged in interstate commerce, and the intestate was killed while employed in that commerce. The plaintiff could not sue in her individual capacity under the Federal act. More than two years after the injury the Circuit Court permitted an amendment, by which she was allowed to prosecute the action as administratrix of her son. The U. S. Supreme Court approved the amendment, and held that it was not equivalent to the commencement of a new action, so as to render it subject to the two-years limitation prescribed by section 6 of the Federal Employers' Liability Act, and that the amendment related back to the beginning of the action."

In the *Renn case* the Court said: "When the Federal Employers' Liability Act was passed, an anomalous situation was created for that there were two lines of remedies for cases of this kind emanating from different legislative jurisdictions, the one necessarily exclusive of the other, both administered by the same court, and the respective applicability of the one or the other, both determined solely by the relation, or want of relation, of the parties to intrastate commerce. It is manifestly desirable that such an anomaly should not be made a mere pitfall, and that it should not become an undue obstacle to the prosecution of a cause of action on its larger merits." This is exactly what the plaintiff is seeking to have held by this Court on this appeal.

There was but one occurrence, creating one cause of action upon the same identical state of facts. If among those facts the jury should find that the plaintiff's intestate was killed while employed in intrastate commerce, that would entitle the plaintiff to recover the remedy prescribed by the Virginia statute. If, on the contrary, the jury should determine at the trial that the plaintiff's intestate was killed while engaged in interstate commerce, then the plaintiff would be entitled to recover the remedy prescribed by the Federal Employers' Liability Act. The merits are the same in either case. Whether the intestate was engaged in inter- or intrastate commerce does not affect either the *cause* of action or the *right* of action, nor the jurisdiction, but merely the remedy to be granted by the same court. Our statute provides, and we have always held, that the relief demanded is immaterial, and that the plaintiff is entitled to recover whatever remedy the facts found by the jury entitle him to receive. C. S., 506 (3), and cases cited thereunder.

This being so, and there having never been but one cause of action, the statute of limitations ceased to run from the issuance of the summons in the first case, and from that time the allegations in the complaint have constituted a pending cause of action, on which, if proven, the plaintiff was entitled to recover. It might have been alleged, in claiming the recovery, that the defendant was engaged in interstate commerce, and in the same complaint, or by amendment, that he was engaged in intrastate commerce, but neither of these affected the right of action. Both could have been alleged at the same time, and if one of these were omitted it could be supplied by an amendment, and when this was done the statement of the cause of action being thus perfected, dated back to the issuance of the original summons. And when a nonsuit was taken under the Virginia cause of action, this could be reinstated within 12 months after such nonsuit in the terms of their statute.

Shifting from asking one remedy to another, or adding an additional claim for remedy upon the same state of facts, does not work any change in the cause of action. This has been often decided. In *Woodcock v. Bostic,* 128 N. C., 243, the Court held that an action at law may be converted into a suit in equity by an amended complaint when the facts of the transaction at the base of both are the same, without the statute of limitations coming into play. There are numerous decisions in the other states to the same effect, but this is a clear statement in our own Court of the basic principle of our procedure, which abolishes distinctions in forms of action and the distinction formerly existing between actions at law and proceedings in equity. In all the courts in which the reform procedure obtains, it has been held that a change from tort to contract, or *vice versa,* by amending the pleadings, is regarded as a mere variation in a matter of form. In *Howard v. R. R.,* 11 App. D. C., 300, it was held that when an amendment has been made to a declaration, the question whether the action has been thereby opened to the bar of limitations depends upon the matter of substance. Whether the question of action remains the same is the test, and the mere change from the form of action in *assumpsit* to one in tort is immaterial. In several of the states where an action can be grounded upon a right conferred by statute, or upon a right at common law, it has been held that where the basic transaction is the same the change from one to the other does not make a new cause of action.

In *R. R. v. Pointer,* 113 Conn., 952, the Court held that where, in an action against a railroad corporation for negligently causing the death of the plaintiff's intestate in another state, the plaintiff omits to plead the foreign statute giving a right of action for such cause, he may amend and supply such omission, and the amendment will relate back to the commencement of the action so that the bar of the statute of limitations will not come into play.

The Supreme Court of North Carolina has repeatedly held that there is a distinction between the *cause* of action and the *right* of action, the cause being the wrongful acts which caused the death and the consequences, the right of action being the right to sue for that cause conferred by the statute, and the Supreme Court of the United States has repeatedly upheld such decisions of this Court, though in some jurisdictions a contrary doctrine has been sustained.

There has been much ingenuity in arguing that the plaintiff has lost the right to recover for the wrongful death of his intestate, but upon the plain intendment of our statutes and procedure, and in equity and justice, in this case in which the allegations in the complaint have been approved by the jury, and therefore must be taken as true, the beneficiaries of the deceased are entitled to recover compensation for the wrongful death inflicted upon him by the defendant.

Within the statutory time, the plaintiff brought this action upon the allegations of facts which have been sustained by the jury, and which, as a matter of law, whether under the Federal statute or under the Virginia statute entitle the plaintiff to recover. The only difference has been, not as to the cause of action, or as to the damages, or as to the right of the plaintiff to recover, but whether he was entitled to the remedy granted by the Virginia statute or under the Federal statute. This being so, and the cause of action having been pleaded and pending in court ever since the original summons were issued, certainly the plaintiff should be entitled to recover, irrespective whether the remedy asked should be that authorized by one statute or the other, or under both, or whether both remedies were asked in the same action, or whether one was added and unaffected by the fact that in deference to the ruling of a judge who took a contrary view, a nonsuit was entered as to the demand for remedy under the Virginia statute, especially as that demand was reinstated in a new action instituted within 12 months, as authorized by the Virginia statute.

An action for a serious wrong in a court of justice ought not to be denied upon metaphysical distinctions, or ingenious discussions based upon a matching of wits between counsel. The judgment obtained by the plaintiff, after so long a delay, upon a verdict of the jury, in my judgment, should be affirmed.

W. J. OLIVE v. G. T. KEARSLEY.

(Filed 22 March, 1922.)

1. Contracts — Brokers — Principal and Agent—Executory Contracts—Revocation—Commissioners.

A contract for the sale of land upon commission is terminable before its consummation at the will of either party, when it is silent as to its duration. Where the owner exercises his right to revoke before the broker has procured a purchaser acceptable to him according to the terms of the agreement, the contract remains executory, and the broker, however earnest and beneficial his efforts, is not entitled to his commissions.

2. Same—Evidence—Questions for Jury—Trials.

Where a brokerage contract for commissions for the sale of lands is revocable by the owner at will, and the evidence is conflicting as to whether the owner, after exercising his right to revoke, had procured a purchaser from another source and had independently effected the sale, or whether the plaintiff, suing for his commissions as agent, had performed his obligations in obtaining the purchaser, an issue of fact is presented for the determination of the jury.

3. Contracts — Brokers — Principal and Agent — Commissions—Agency Coupled With an Interest.

To prevent the application of the principle by which the principal may revoke an agency for the sale of land at will, the agency must be coupled with the agent's interest in the subject-matter of the contract, and not merely collateral thereto, as where the agent is interested only in the commissions he is to receive under the conditions of his executory contract.

APPEAL by defendant from *Cranmer, J.*, at July Term, 1921, of LEE.

This is an action by a broker on an alleged indebtedness of $250 for making sale of land. The defendant listed the land for sale with the plaintiff and a number of other brokers, and the same was sold to one Price. The defendant was introduced to Price by one Carter (to whom the defendant paid $25 for making the sale). The plaintiff was allowed to testify over the defendant's objection that the attendance of Price was procured by the "influence of plaintiff," acting through one McGhee, who was dead at the time of the trial. The defendant testified that he sold the land himself to Price, that plaintiff was not there and said nothing to him about selling the land until after it was sold.

The contest was over the right of the defendant to revoke the agency of brokerage. Verdict and judgment for plaintiff; appeal by defendant.

A. A. F. Seawell for plaintiff.
Hoyle & Hoyle for defendant.

CLARK, C. J. The court instructed the jury: "Now it is the law in North Carolina that when land is placed in the hands of a broker for sale, and that broker has begun negotiations, that the owner cannot take the matter into his own hands and complete the sale and refuse to pay commission. Now, if you find from the evidence in this case—it is not refuted that the land was placed in the hands of Olive for sale—if you find from the greater weight of the evidence in this case that he had begun negotiations and brought the buyer down, then I instruct you that the defendant could not take the matter out of his hands and avoid paying his commission."

The instruction that if the broker "had begun negotiations that the owner cannot take the matter into his own hands and complete the sale and refuse to pay commission" was error. There was evidence from the defendant which denies that Olive effected the sale. He testified: "I placed my land with Olive for sale. I listed this land with 15 or 20 concerns that sell. I told a number of others that I would pay them to send me a purchaser, among them was Abe Carter, who had come from Rockingham County, and who was the first man who brought Price (the purchaser) to me. Olive said nothing to me about selling the land until after it was sold and the trade closed, then he claimed a commission."

Abe Carter testified that the purchaser, Price, lived on an adjoining farm to his in Rockingham County; that he told him about the Kearsley place, and he agreed to go with him to look it over, and he bought the place from Kearsley.

The law applicable in this case is thus stated in *Abbott v. Hunt*, 129 N. C., in which, on page 404, it is said: "An agency can be revoked at any time before a valid and binding contract, within the scope of the agency, has been made with a third party. The only exception is an agency coupled with an interest, and that must be an interest in the subject of the agency, and not merely something collateral, as commissions or compensation for making sale. *Hartley's Appeal,* 53 P. St., 212; 91 Am. Dec., 207, which holds that a power of attorney by which the attorney is to receive as compensation 'one-half of the net proceeds' is not a power coupled with an interest, and is revocable. This case cites a very clear enunciation of the same principle by *Marshall, C. J.,* in *Hunt v. Rousmanier,* 8 Wheat., 174, which is also cited by this Court (as to agencies to solicit insurance) in *Ins. Co. v. Williams,* 91 N. C., 69. In *Brookshire v. Voncannon,* 28 N. C., 231, it is held that a power of attorney is revocable 'at any moment before the actual execution of it.' To same purport, *Wilcox v. Ewing,* 141 U. S., 627; *Mansfield v. Mansfield,* 6 Conn., 559; 16 Am. Dec., 76; Mechem on Agency, secs. 204-210; *Hall v. Gambrill,* 88 Fed., 709. In *Sibbald v. Iron Co.,* 83 N. Y., 378; 22 Am. Rep., 441, it is said: 'Where no time is fixed for the continuance of a contract between broker and principal, either party can terminate it at will, subject only to the ordinary requirements of good faith.' A case on 'all fours' is *Coffin v. Landis,* 46 Pa. St., 426, which holds (p. 434): 'Where one, as agent for another, contracts to sell the land of the latter in consideration of one-half of the net proceeds of the sale, and there is no stipulation in the contract as to the duration of the employment, the principal has a right to terminate it at any time and to discharge the agent from his service without notice, and the plaintiff (agent) cannot recover for any services rendered, or for his loss of employment after his discharge.' And almost as directly in point are the recent cases, *Young v. Trainor,* 158 Ill., 428 (1895), which holds that 'a real estate broker who produces a customer after his principal has withdrawn his offer to sell, is not entitled to a commission,' and *Bailey v. Smith,* 103 Ala., 641 (1894), which is to the same effect, and *Mallonee v. Young* 119 N. C., 549.

. . . .

"In *Atkinson v. Pack,* 114 N. C., 597, and *Martin v. Holly,* 104 N. C., 36, the broker had procured a purchaser at the stipulated price before the revocation of the power, and, of course, being an executed contract, the agent was entitled to his commission, and the same might be true where the revocation was in bad faith, just as the contract was about being consummated, the revocation being for the purpose of depriving the agent of his commissions. But such is not the case here."

This has been often quoted and always followed by this Court. In *Thomas v. Gwyn,* 131 N. C., 461, *Abbott v. Hunt, supra,* was reaffirmed, the Court saying that "where no term is fixed for the continuation of a contract, either party may terminate it at will"; and this was reaffirmed in *Wilmington v. Bryan,* 141 N. C., 671 and 673, which held that a contract of this kind containing no limits as to time is in law a contract terminable at the will of either party.

In *Trust Co. v. Adams,* 145 N. C., 161, *Walker, J.,* states that "When there is no definite time fixed for the employment to sell land upon commission, either party has a right to terminate the agreement at will, subject to the requirement of good faith under the agreement and a sale made in pursuance of his contract." When such broker fails to complete the purchase upon the specified terms before the principal elects to terminate the agreement the principal has the right to terminate the contract if done in good faith.

In *Wright v. Shepard,* 178 N. C., 656, where the defendant, as in this case, claimed that he had revoked the agency and sold the land himself, it was held that this was a question of fact which was properly submitted to the jury by the judge and the verdict against the plaintiff was sustained. *Mr. Justice Stacy* was the trial judge in that case, and the able and instructive brief filed therein for the defendant cites and relies upon *Abbott v. Hunt, supra,* and *Sibbald v. Iron Co., supra,* and *Trust Co. v. Adams, supra,* and thus sums up the doctrine which was stated in those cases by the trial judge and affirmed by this Court: "The broker may devote his time and labor and expend his money with ever so much devotion to the interests of his employee, and yet, if he fails without effecting an agreement or accomplishing a bargain, or abandons the effort, or his authority is fairly and in good faith terminated, he gains no right to commission. He loses the labor and effort which was staked upon success, and in such event it matters not that after his failure and the termination of his agency what he had done proves of use and benefit to the principal."

In *Real Estate Co. v. Sasser,* 179 N. C., 497, it was held, *Brown, J.,* that the interest of an agent in a contract which would prevent the revocation of the agency must be in the subject-matter of the power, and not merely relate to the agent's compensation for its execution, and where the principal contracts for the sale of his land by the agent, the latter to receive whatever he could get for the land over a certain price, and there is no covenant not to revoke, the former may at any time revoke the power before the completion of the deal leaving the broker to an action for damages for the expenses incurred by him and reasonable compensation for the worth of his services rendered before the revocation.

In *Hagood v. Holland,* 181 N. C., 64, it was held by *Stacy, J.,* that "A contract of agency for the sale of land for an indefinite and unstated time may be revoked at will by the owner in the absence of agreement or covenant to the contrary," citing *Abbott v. Hunt, supra,* and *Real Estate Co. v. Sasser, supra.*

In *House v. Abell,* 182 N. C., 628, the Court held that where the broker, "within the terms of authority given, succeeds in bringing about a contract of sale with a responsible purchaser, he is entitled to stipulated commission or reasonable worth of his services if no definite amount is specified, and his claim therefor is not affected because the principal has seen proper to voluntarily surrender his rights in the contract"; and further, "a broker who has agreed, for compensation, to procure a purchaser for lands has earned his commission when he effects a valid, written contract for sale of the lands upon terms and with the purchaser acceptable to the owner, and the voluntary failure of the vendor to compel him to do so will not defeat the broker's claim for commission." It will be seen at once that there is no conflict in these rulings to the case at bar. In the later case the contract was performed and the sale perfected, but the vendor refused to make the conveyance. But in cases like the present, where the sale was not completed, the principal has the right to revoke the agency at any time before the sale was perfected, or if there is a controversy whether the sale was completed by the party who first "began negotiations," then it was error not to submit that question of fact to the jury.

In the present case there was ample evidence, if believed, not only that the defendant had revoked the agency before the sale was made, but that it was actually made by another agent whom the defendant paid for the service, and he was entitled to have this phase of the evidence presented to the jury.

For this error there must be a
New trial.

C. M. MINTON v. JOHN A. EARLY AND WIFE, GEORGIA A. EARLY.

(Filed 22 March, 1922.)

1. Criminal Law—Landlord and Tenant—Abandonment of Crop—Hiring Tenant—Fraud—Statutes—Constitutional Law.

Under the provisions of our Constitution, Art. I, sec. 16, inhibiting "imprisonment for debt excepting in cases of fraud," C. S., 4480, making it a misdemeanor for a tenant to willfully abandon his crop without paying for advances made to him by his landlord, and not requiring allegation or evidence of fraud, is unconstitutional, and the further provisions of the statute creating a civil liability for the one hiring such tenant with knowledge of the circumstances, being connected with and dependent upon the former, both in express terms and substance, is likewise unconstitutional. *Semble*, were the statute valid, an action against the person hiring the tenant, resting upon contract, would be jurisdictional in the court of the justice of the peace to the extent of $200.

2. Same—Contracts.

The liability of one hiring a tenant of another who has willfully abandoned a crop without paying the landlord for advances he has made thereon fixed by the provisions of C. S., 4480, without allegation or evidence of fraud on the part of such tenant, is in contravention of the liberties and vested rights protected by constitutional guaranties that should always be upheld by the courts.

3. Courts—Justices of the Peace—Jurisdiction—Landlord and Tenant—Tort—Hiring Tenant.

As to whether, under the common law, one who has "willfully and unlawfully persuaded, induced, and assisted" the tenant of another to abandon his crops without paying his landlord for advances made to him thereon, is guilty of an actionable tort, *quere;* but where the action has been commenced in the court of a justice of the peace it should be dismissed if to recover more than the jurisdictional amount of $50.

4. Courts—Jurisdiction—Motions—Actions—Dismissal.

A motion to dismiss an action for want of jurisdiction is not waived by answer over, but may be presented by motion to dismiss, demurrer *ore tenus*, or may be acted on by the court *ex mero motu*.

CLARK, C. J., concurs in the result.

APPEAL by plaintiff from *Calvert, J.*, at the August Term, 1921, of BERTIE.

Civil action, heard on appeal from a justice's court.

The action, purporting to be under C. S., 4480, is instituted by plaintiff, a former landlord, against defendants, on averment that one Jack Outlaw, after agreeing to make a crop on certain lands of plaintiff for 1918, and receiving advancements for said purpose as plaintiff's tenant to the amount of $79.82, wrongfully and willfully abandoned said crop without paying plaintiff for said advancements. And that defendants, with full knowledge of said abandonment, and after being forbidden so to do, employed said tenant to work for them, and moved him on their lands, contrary to law as contained in C. S., 4480. Defendant, reserving the right to move to dismiss for lack of jurisdiction, and for that the statute on which the claim is based is unconstitutional, made answer denying the acts alleged against defendant, and denying any and all knowledge of any breach of contract by the alleged tenant, and at spring term thereafter moved to dismiss the case for that the statute is unconstitutional. Motion overruled. Cause continued.

At the trial term, the jury having been impaneled, the record states that the defendants again demurred because it appears that the action lies only in tort, and that the justice had no jurisdiction of same, the demand being for more than $50, and the justice's judgment being for more than that sum. Upon such demurrer and motion, judgment was rendered dismissing the action, and plaintiff excepted and appealed.

Winston & Matthews for plaintiff.
Alex. Lassiter and John W. Davenport for defendant.

HOKE, J. The action is based upon C. S., 4480, and if this were a valid law, we see no reason why an action *ex contractu* could not be maintained for the jurisdictional amount of $200, on the same principle we uphold in allowing a recovery for a statutory penalty; debt being maintainable for a "sum certain or readily reducible to certainty from fixed data or per agreement." *Katzenstein v. R. R.*, 84 N. C., 688; 2d Waites Action and Defenses, p. 109; 1st Chitty's Pleadings, 108-109; 8th Encyclopedia of Law (2 ed.).

But, in our opinion, the statute referred to, imposing as it does the punishment of fine and imprisonment for abandoning a tenancy or crop, without paying for the advances made by the landlord, and without requiring any allegation or proof of fraud, either in the inception or breach of the contract, is in violation of our constitutional provision, Art. I, sec. 16, which inhibits "imprisonment for debt except in cases of fraud." This has been virtually held in *S. v. Williams*, 150 N. C., 802, wherein the Court decides, the present *Chief Justice* delivering the opinion, that without averment of fraud, a bill of indictment under this section, then Rev., 3366, should be quashed. And for the same reasons, the clause of the statute making it indictable for a landlord to fail and refuse to furnish advancements as per agreement is an invalid provision, for without either averment or proof of fraud, both are ordinary breaches of contract, for which the parties charged may only be held for the civil liability.

A similar decision appears in *S. v. Griffin*, 154 N. C., 611, where a conviction, under C. S., 4281; Rev., 3431, for obtaining money, etc., under a promise to begin certain work, and willful breach, was set aside for lack of any proof of fraud in the transaction other than the obtaining of the advances under the promise to begin the work and a failure to comply.

And the same general principle is approved and applied by the Supreme Court of the United States, in *Bailey v. Alabama*, 219 U. S., 219, a decision which this Court recognized as controlling in the *Griffin case, supra.*

The parts of this statute which attempt to fix criminal liability on the tenant or cropper who has merely broken his contract being therefore invalid because in contravention of the constitutional guarantees protecting the liberty of the citizen, the clause which imposes, or attempts to impose, civil liability on any one employing such tenant or cropper with knowledge of such breach, connected with and dependent as it is upon the former, both in express terms and substance, must also be avoided. *Keith v. Lockhart*, 171 N. C., 451-548, citing Employers' Liability Cases, 207 U. S., 463-501; *Riggsbee v. Durham*, 94 N. C., 800; Black on Constitutional Law, p. 63.

In *Riggsbee's case, supra*, the principle adverted to is stated as follows: "While some provisions in a statute may be unconstitutional and void, others may remain and be enforced, but the rule does not apply, when the constitutional and unconstitutional parts of the statute are conducive to the same object, and the dislocation of the unconstitutional part would so affect its operation that the act would fail in an essential part."

The position finds support in the fact that there is doubt if the Legislature could impose a liability of this kind upon one employing another who has merely incurred civil liability by a breach of his contract. This right of a citizen to contract and deal with another is itself among the liberties and vested rights protected by constitutional guarantees, and should always be carefully upheld by the courts. *Smith v. Texas*, 233 U. S., 630; *Allgeyer et al. v. State of Louisiana*, 165 U. S., 578; 6 R. C. L., 269.

In *Smith v. Texas, supra*, *Associate Justice Lamar*, speaking to the question, said: "Life, liberty, property, and the equal protection of the law, grouped together in the Constitution, are so related that the deprivation of any one of those separate and independent rights may lessen or extinguish the value of the other three. In so far as a man is deprived of the right to labor, his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who are permitted to work. Liberty means more than freedom from servitude, and the constitutional guarantee is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling."

For the reasons stated, the action cannot, in our opinion, be maintained upon the statute, and the judgment of the lower court dismissing the same must on that ground be upheld, and the position is not waived because the defendant has answered over after demurrer overruled. *Garrison v. Williams*, 150 N. C., 674, and authorities cited.

The plaintiff has supplemented his declaration on the statute by the averment that "defendants willfully and unlawfully persuaded, induced, and assisted said Jack Outlaw to violate his contract with plaintiff, and it is contended in the argument before us that by reason of this additional averment, with evidence tending to support it, the plaintiff could sustain a recovery as in a common-law action for wrongfully enticing his tenant from his position and employment, to plaintiff's damage. The action is said to have originated or to have been originally maintained on the First English Statute of Laborers, and while it has been recognized as existent since the repeal of that statute, the cause of action so far as examined, has been restricted to a willful or malicious enticement from the personal service of another. Hale on Torts, pp. 264-265, and authorities cited.

The decisions of this State would seem to be against the maintenance of such an action in the case of tenant or cropper without a valid statute to that effect. *S. v. Etheridge,* 169 N. C., 263; *Swain v. Johnson,* 151 N. C., 93; *S. v. Hoover,* 107 N. C., 795; *Jones v. Stanly,* 76 N. C., 355; *Haskins v. Royster,* 70 N. C., 601. But we are not now required to make direct decision on the question, for all the cases are agreed that such an action is for a tort, and this being a case on appeal from a justice's court, the jurisdiction may not be extended to claims in excess of $50. *Sewing Machine Co. v. Burger,* 181 N. C., 241, citing *Cheese Co. v. Pipkin,* 155 N. C., 394, and other cases.

In this aspect of the matter, the judgment of his Honor is clearly correct, and this, like the former position, going to the jurisdiction of the court, is not waived by answer over, but may be presented by motion to dismiss, demurrer *ore tenus,* or may be acted on by the court *ex mero motu. Garrison v. Williams, supra.*

We find no reversible error presented, and the judgment dismissing the action is affirmed.

No error.

CLARK, C. J., concurs in the result.

CITY OF GOLDSBORO v. THOMAS H. HOLMES.

(Filed 22 March, 1922.)

Appeal and Error—Fragmentary Appeal—Dismissal—Cities and Towns—Condemnation.

Where commissioners appointed to assess damages to land for appropriation for the purposes of a street make report, to which no exceptions are filed, and after the time for filing exceptions expires, the clerk, on motion of petitioner, renders judgment of nonsuit, which is reversed by the judge in term, an appeal by the petitioner is premature and fragmentary, and will not be entertained.

APPEAL by plaintiff from *Cranmer, J.,* at the August Term, 1921, of WAYNE.

On 17 November, 1919, the plaintiff made an order for the extension of Ash Street, and thereafter instituted a proceeding for the condemnation of the defendant's property. On 26 November, 1920, the clerk made an order condemning a strip of the defendant's land 50 by 420 feet, and appointed three commissioners to appraise the land and the benefits. On 24 January, 1921, the commissioners made report, assessing the defendant's damages at $35,000, and finding no special benefits. To this report no exceptions were filed. On 7 March, 1921, without notice to defendant, the clerk, at the instance of the plaintiff, signed a judgment of nonsuit; and a few days afterward, upon learning of this judgment, the defendant made a motion before the clerk to set it aside. The motion was denied, and upon appeal his Honor reversed the judgment signed by the clerk. From his Honor's judgment the plaintiff appealed. The plaintiff has not paid the damages assessed, nor taken possession of the land.

D. C. Humphrey, E. M. Land, and Dickerson & Freeman for plaintiff.
Langston, Allen & Taylor for defendant.

ADAMS, J. The record presents an interesting and important question, but we are precluded from giving it consideration at this time. His Honor's order was interlocutory, not final. The trial should determine all matters at issue, so that a final judgment may be rendered. An appeal that is fragmentary will not be entertained. In addition, we have repeatedly held that no appeal lies from a refusal to dismiss an action or proceeding. *Capps v. R. R.,* 182 N. C., 758; *Farr v. Lumber Co., ibid.,* 725; *Cement Co. v. Phillips, ibid.,* 438. The appeal, therefore, must be dismissed.

Appeal dismissed.

STANDARD OIL COMPANY v. M. BANKS AND J. N. POTTER.

(Filed 22 March, 1922.)

1. **Appeal and Error—Trials—Evidence—Questions for Jury.**

   Held, the evidence in this case presented only issues of fact for the jury to determine, and there was no prejudice to the appellant in the trial of the action.

2. **Partnership—Trials—Evidence—Questions for Jury.**

   In an action to recover on an account for gasoline sold and delivered to the one running a garage and another, there was evidence in plaintiff's behalf that he had presented the bill to both defendants and the latter exclaimed that he should have been informed before the account had gotten so large, that "we will straighten it up," and that he would get after his codefendant about it, with further evidence that one owned the building and the other was a tenant therein conducting his own business: *Held*, sufficient to be submitted to the jury upon the issue of partnership, binding both defendants to the payment of the account.

APPEAL by defendants from *Lyon, J.*, at November Term, 1921, of PAMLICO.

Civil action to recover balance due on open account for oils and gasoline sold and delivered to the defendants during the year 1920.

From a verdict and judgment in favor of plaintiff, the defendants appealed.

Z. V. Rawls for plaintiff.
F. C. Brinson for defendants.

STACY, J. This action is brought to recover the balance due on an open account for oils and gasoline sold and delivered by the plaintiff to the defendants during the year 1920. The question of indebtedness was not denied; the amount only was in dispute. Plaintiff sued for $910.65, contending that such was the correct amount of its claim. M. Banks, one of the defendants, admitted an indebtedness of $395.49, but denied that any larger sum was due. Upon the issue thus joined, the jury answered in favor of the plaintiff. This was purely a question of fact, and has been settled by the verdict.

There was also an issue as to whether J. N. Potter was a partner and interested with his codefendant in the firm of M. Banks & Company. Plaintiff's local agent testified: "I got a statement from the company saying that M. Banks & Company owed them a large account. I saw Mr. Banks, and also Mr. Potter, and Mr. Potter said, 'Great Lord, why didn't you let me know before it got so large.'" There was also evidence tending to show that Potter owned the garage—though it was contended that he and Banks bore to each other the relation of landlord and tenant only—and that he stated to plaintiff's agent he would get after Banks about the account; and further, he is quoted as having said: "We will have to straighten it up, and I wish you had let me known about it before it got so large." From this evidence we think the jury was fully justified in finding with the plaintiff on the second issue. The defendant Potter did not testify.

The whole controversy narrowed itself to questions of facts, and we have found no error in the trial.

No error.

JULIUS G. DEES v. R. H. LEE.

(Filed 22 March, 1922.)

Appeal and Error—Instructions—Statement of Contentions—Objections and Exceptions—Expression of Opinion—Statutes.

Exceptions to the statement of the contentions of the parties by the trial judge in his charge to the jury, should be taken at the time, or at its conclusion, so as to afford him an opportunity to correct it, and the position of the appellant taken thereafter that it was done in such manner as an expression of opinion adverse to him, is untenable on this appeal from the facts appearing of record.

APPEAL by defendant from *Lyon, J.*, at November Term, 1921, of PAMLICO.

Civil action to recover damages for an alleged breach of contract to sell land.

Upon denial of liability and issues joined, the jury returned the following verdict:

"1. Did the plaintiff and defendant contract, as alleged in the complaint? Answer: 'Yes.'

"2. If so, did plaintiff and defendant rescind said contract? Answer: 'No.'

"3. If so, has plaintiff been at all times ready, able, and willing to perform the contract on his part? Answer: 'Yes.'

"4. Did defendant wrongfully breach the contract, as alleged in the complaint? Answer: 'Yes.'

"5. What damage, if any, is plaintiff entitled to recover? Answer: '$400.'"

Judgment on the verdict in favor of plaintiff, from which the defendant appealed.

D. L. Ward and F. C. Brinson for plaintiff.
Z. V. Rawls for defendant.

STACY, J. Three of the four exceptions appearing on the record are directed to portions of his Honor's charge, in which he undertakes to state the contentions of the parties. Defendant says the contentions of the plaintiff were stated in such a manner as to amount to an expression of opinion from the court. We have examined the charge with a view of determining whether the defendant could have been prejudiced in any degree by the method or form in which the contentions were given, but we have found nothing upon which to base any criticism. The charge as a whole seems to have been fair, impartial, and free from error. Furthermore, these exceptions come within the well settled rule

t objections to the statement of contentions must be made at some
propriate time during the charge, or at its conclusion, so that the
al court may be given an opportunity to correct any error in the
spect indicated. *S. v. Hall,* 181 N. C., 527; *McMahan v. Spruce Co.,*
0 N. C., 636, and cases there cited.

The other exceptions are without special merit, and must be over-
led. We have discovered no sufficient reason for disturbing the ver-
t and judgment.

No error.

DORA NOBLES ET AL. v. W. H. DAVENPORT.

(Filed 22 March, 1922.)

Parent and Child—Advancements.

An advancement is a voluntary and irrevocable gift of money or property, real or personal, *in praesenti* by a parent to a child with the intention on his part that it shall represent a part or the whole of his estate to which the donee would be entitled at his death.

Same—Presumptions—Donor's Intent—Equality of Division.

The legal presumption that when a parent dies intestate he intends an equality of division of his estate or property between his children is subject to rebuttal by parol evidence; and whether the transfer is to be regarded as a gift, or a sale, or an advancement, the ascertained intent of the grantor controls as it existed at the time of the transaction.

Same—Deeds and Conveyances—Life Estate Reserved—Estates.

The question as to whether a conveyance of land by a father to his son should be construed as an advancement or sale is not affected by his reserving to himself a life estate therein.

Same—Evidence—Parol Evidence—Appeal and Error.

To discover whether the transfer of property by the father in his lifetime to his child was intended by him as an advancement, gift, or sale, in whole or in part, the circumstances surrounding the interested parties at the time may be considered.

Same—Rebuttal.

A substantial gift *in praesenti* by the parent to his child, by a conveyance of land in consideration of love and affection, or a nominal sum, is ordinarily presumed to be an advancement, which presumption may be overcome, or rebutted where it is shown that the transfer had been made for a valuable or adequate consideration.

Same—Questions for Jury—Trials.

A father conveyed a large portion of his lands to his son in consideration of love and affection, reserving a life estate, which deed was not registered, and made a conveyance of other lands to a daughter for the same consideration, which was afterwards registered and admitted to have been an advancement. Thereafter the donor conveyed to the son the same lands he had theretofore conveyed to him, expressing a consideration of love and affection and the sum of $700, receiving back a mortgage to secure the purchase-money notes, which was subsequently canceled of record, followed afterwards by a release of the life estate the grantor had reserved to himself in his former deeds. In an action by the donor's other children to declare the latter deed an advancement: *Held*, the evidence was sufficient to be submitted to the jury upon the donor's intent, as to whether the transfer was an advancement or sale, in whole or in part; and *held further*, that evidence as to the value of the *locus in quo* was erroneously excluded.

APPEAL by plaintiff from *Bond, J.*, at the June Term, 1921, of LENOIR.

Dora Nobles and her sister, Denny Nobles (the husband of each being a party), instituted before the clerk a special proceeding against the defendant (their brother) for partition of land and accounting for advancements. The plaintiffs alleged that their father, S. H. Davenport, conveyed to Denny Nobles and to the defendant each a tract of land as an advancement, and that the petitioner, Denny, was willing to account. The defendant filed an answer denying that he had been advanced, and the case was transferred to the civil docket. The cause was heard in term before Bond, J., and a jury, at the June Term, 1921, of Lenoir. The following issue was submitted to the jury: "Was the conveyance of land by deed, referred to in the pleadings in this cause, from S. H. Davenport to the defendant W. H. Davenport a settlement and advancement to said defendant?" His Honor instructed the jury, upon all the evidence, to answer the issue "No." Judgment for defendant; plaintiffs appealed.

Rouse & Rouse for plaintiffs.
Cowper, Whitaker & Allen for defendant.

ADAMS, J. S. H. Davenport, father of the plaintiffs and the defendant, died intestate, 8 September, 1919, and his wife, in January, 1909. On 13 October, 1905, he and his wife executed and delivered to Denny Nobles, one of the plaintiffs, a deed for ninety-seven acres of land, designated a deed of gift, reserving to the grantors a life estate. This conveyance was duly acknowledged before a justice of the peace in October, 1905, and in November, 1919, it was duly probated and registered. All the parties admit that it was intended as an advancement. On 13 October, 1905, S. H. Davenport and his wife signed and acknowledged before the same justice of the peace another deed, likewise designated a gift, purporting to convey to the defendant a tract of land containing one hundred and two acres, and reserving a life estate to the grantors. This deed has never been registered. In each deed the consideration recited is natural love and affection. On 15 November, 1910, S. H. Davenport, reserving a life estate, executed and delivered to the defendant another deed for said one hundred and two acres, reciting as the consideration natural love and affection, and $700 paid by the grantee. This conveyance was acknowledged by the grantor in March, 1911, and registered in the following November. Simultaneously with the execution of this deed the defendant executed and delivered to S. H. Davenport a mortgage on said land, reciting an indebtedness to the mortgagee of $700, evidenced by three notes. The mortgage was acknowledged on 10 May, 1911, probated and registered on 29 March, 1913, and marked satisfied on 20 December, 1918. On 26 December, 1916, S. H. Davenport executed and delivered to the defendant a release of his reserved life estate in the land described in the deed and mortgage.

His Honor's instruction cannot be sustained if the evidence, construed most strongly for the plaintiff, will warrant an affirmative answer to the issue; and we are of opinion that the evidence thus construed should have been submitted to the jury.

In its legal sense an advancement is an irrevocable gift *in praesenti* of money or property, real or personal, to a child by a parent, to enable the donee to anticipate his inheritance to the extent of the gift; or, as somewhat differently defined, a perfect and irrevocable gift, not required by law, made by a parent during his lifetime to his child, with the intention on the part of the donor that such gift shall represent a part or the whole of the portion of the donor's estate that the donee would be entitled to on the death of the donor intestate. 18 C. J., 911; 1 R. C. L., 653; *Thompson v. Smith,* 160 N. C., 257; *Hollister v. Attmore,* 58 N. C., 373; *Meadows v. Meadows,* 33 N. C., 148. The doctrine of advancements was the subject of statutory enactment in England as early as the reign of Charles II. (22 and 23 Car. II., 1682-83), and in this jurisdiction it is set forth, as to both real and personal property, in sections 138 and 1654 (2) of Consolidated Statutes. This doctrine is based on the presumption that a parent who dies intestate intends equality among his children in the division of his property; but such presumption is subject to rebuttal by parol evidence. The decision in *Wilkinson v. Wilkinson,* 17 N. C., 376, may be considered in connection with *Thompson v. Smith, supra; Ex parte Griffin,* 142 N. C., 116; *James v. James,* 76 N. C., 331; *Harper v. Harper,* 92 N. C., 300. In the determination of the question whether a transfer of property from parent to child is a gift, a sale, or an advancement the intention of the grantor is the controlling element. *Thompson v. Smith, supra; Kiger v. Terry,* 119 N. C., 456; *Harper v. Harper, supra; Bradsher v. Cannady,* 76 N. C., 445; *James v. James, supra; Cowan v. Tucker,* 27 N. C., 78; 1 R. C. L., 656. And only such intention as exists at the time of the transaction is to be considered. Therefore, a parent's transfer of property to his child may constitute in part an advancement and in part a gift or a sale. *Walker v. Brooks,* 99 N. C., 207; 18 C. J., 918. In endeavoring to discover the donor's intention we must consider the circumstances surrounding the interested parties at the time the property is transferred; for the circumstances may be such as to create a presumption of advancement. Thus a substantial gift of property by a parent to his child, or a conveyance of land in consideration of love and affection, or a nominal sum, is ordinarily presumed to be an advancement. *Thompson v. Smith, supra; Kiger v. Terry, supra; Harper v. Harper, supra.* But if the transfer is made for a valuable and adequate consideration there is no presumption of an advancement, but rather the contrary. *Kiger v. Terry, supra; Ex parte Griffin, supra.* Nor is the doctrine of presumptions affected by the reservation of a life estate. 18 C. J., 918, sec. 221.

Applying these principles, although the plaintiffs declare only on the deed of 1910, we conclude that his Honor should have submitted to the jury any competent evidence relating to the alleged delivery and acceptance of the deeds of 1905; relating to the actual consideration of the deed and mortgage of 1910; to the value of the land conveyed; to the circumstances under which the mortgage was canceled; and to the grantor's release of his life estate, together with any other relevant evidence tending to show the intention of the grantor at the time he executed the deed of 1910. For these reasons we hold that the plaintiffs are entitled to have the issues determined by another jury.

There are exceptions to evidence which may not arise in another trial; but it is not inappropriate to say that in our opinion the proposed testimony of Benjamin Nobles and Benjamin Davis, as presented in the record, was properly excluded. In the circumstances disclosed it was not competent either as a part of the *res gestæ* or as a declaration against the interest of the grantor. *Hicks v. Forrest,* 41 N. C., 528; *Melvin v. Bullard,* 82 N. C., 34; *Roe v. Journigan,* 175 N. C., 261; *S. c.,* 181 N. C., 180; *Reece v. Woods,* 182 N. C., 703; *Tart v. Tart,* 154 N. C., 502; 1 R. C. L., 665 *et seq.;* 17 A. & E. Anno. Cas., 886. We see no sufficient reason for excluding the proposed testimony of Calvin Robinson as to the value of the land if the court should hold that he is qualified to express an opinion based upon personal observation of the property. *Bennett v. Mfg. Co.,* 147 N. C., 620; *Britt v. R. R.,* 148 N. C., 37.

The plaintiffs are entitled to a new trial. Let this be certified to the Superior Court of Lenoir County.

New trial.

W. T. CLIFTON AND LUCIAN CLIFTON v. DUPLIN HIGHWAY COMMISSION ET AL.

(Filed 22 March, 1922.)

1. **Roads and Highways — Condemnation — Dwellings—Trees—Yards—Legislation—Acts—Constitutional Law.**

Unless prohibited by the Constitution, the power of the State to appropriate private property to public use extends to every species of property within its territorial jurisdiction, and where a public-local act creates a county highway district and gives to it, broadly and without restriction, the right to condemn private property for highway purposes, the power so given will include dwelling-houses, trees and yards of the owners of land lying upon the roadway, unless such power is excluded under general or other State laws applicable.

2. **Same—General Laws—Restrictions—Statutes.**

The Public-Local Laws of 1921, ch. 447, creates the Duplin County Highway District, giving it general powers of condemning lands for road purposes without reservation, and the general statutes not being applicable, *it is held* that the general right to condemn for the purposes designated does not exclude the dwelling, trees, or yards of the private owners, as in other specified instances. C. S., 706, 714, 3668, 3669, 3746, and ch. 70, Art. IV, sec. 2.

APPEAL by defendant highway commission from *Lyon, J.,* at the January Term, 1922, of DUPLIN.

Appeal from an order dissolving a restraining order.

W. T. Clifton owns a life estate and Lucian Clifton the remainder in certain real estate in the town of Faison, on which is situated a dwelling, occupied by W. T. Clifton, together with shade trees and yard shrubbery.

The North Carolina Highway Commission laid out and located a public highway extending from Warsaw northward to the Wayne County line, passing over plaintiff's land, thence on to the Virginia line. Under competitive bidding the State Highway Commission let the construction of the highway at the place in question to the defendant Lacey, who has completed a considerable part of the work. Lacey called on the State Highway Commission to remove the building in the highway as laid out, and the State Highway Commission called on the Duplin County Highway Commission to remove the obstructions. The Duplin County commission employed J. R. Lamb to remove them at a price to be paid by the county commissioners. The defendants were preparing to move the dwelling when, on application of plaintiffs, Judge Lyon issued a temporary order restraining the defendants from trespassing upon or interfering with the plaintiffs' property. On the hearing the restraining order was dissolved, and the plaintiffs appealed.

The only defendants are Lamb, Lacey, and the Duplin County Highway Commission.

Grady & Graham for plaintiffs.
R. D. Johnson for defendant.

ADAMS, J. The Duplin County Highway Commission was created by act of the General Assembly at the regular session of 1921, and is not one of the corporations included in C. S., 1706. Public-Local Laws 1921, ch. 447. The provisions of section 1714 are restricted to the corporations described in section 1706, and therefore do not apply to the defendant. In like manner sections 3668, 3669, and 3746 are applicable only to the county road commissions provided for in the chapter concerning roads and highways. C. S., ch. 70, art. 4, part 2. The defendant is not one of these commissions. Whether the State Highway Commission entered into a contract with the Duplin County commission, under section 3592, does not definitely appear, and under the circumstances is immaterial. The State Commission is not a party to the action, and as the defendants entered upon the property under the alleged authority of the Duplin County commission, the right to condemn the property of the plaintiffs must be determined by the provisions of the act under which the latter commission was created. Public-Local Laws 1921, ch. 447. Section 12, in part, is as follows: "That the highway commission shall have power, on petition or on their own motion, to relocate, construct, widen, or otherwise change public roads or parts thereof, and to lay out and construct new roads or parts thereof, and to lay out and construct new roads when in their judgment the same will be advantageous to public travel, and for such purposes are authorized, through their agents, to enter upon lands to make the necessary surveys. Before doing any work or construction, apart from the surveys, the board shall give to the owner of the land over which the proposed new road or change of road may run at least five (5) days notice in writing of a time and place, when and where, the highway commission will consider the question of condemning the land. If the landowner be a minor, or insane, such notice shall be given to him and his guardian, or, if there be no guardian, to the person with whom he is living. If the landowner be a nonresident, or cannot be found within the county, such notice shall be mailed to his last known address and publication made in a newspaper in Duplin County, at least twenty (20) days before the hearing. If the highway commission shall find the proposed improvement advantageous to public travel, and shall decide to condemn the land necessary for the road, they shall so declare, and enter the order of condemnation in their minutes. Upon the question of condemnation, the findings and order of the board shall be subject to review by appeal to Superior Court. No strip of land wider than forty (40) feet, with such additional width as may be necessary for cuts and fills, shall be so required by condemnation. Upon making the order of condemnation the highway commission shall have authority, through its agents, to immediately take possession of the land described in the order and proceed to construct the said road." The procedure for ascertaining the compensation also is set forth, but it in no way affects the right of condemnation.

It will be observed that this act contains no such limitation as is provided in the statutes hereinbefore referred to with respect to dwellings, trees, or yards. In the absence of constitutional or statutory restriction the power of the State to appropriate private property to public use extends to every species of property within its territorial jurisdiction. *Richmond R. Co. v. L. R. Co.,* 13 How., 71; *Eastern R. Co. v. Boston R. Co.,* 111 Mass., 125; 20 C. J., 587; *R. R. v. Davis,* 19 N. C., 452; *Wissler v. Power Co.,* 158 N. C., 466; Lewis on Em. Dom., sec. 411.

We are of opinion that under the circumstances of this case the defendants have a right to proceed as authorized by the Legislature, and that the order of his Honor dissolving the restraining order should be affirmed.

Judgment affirmed.

M. V. MOORE & COMPANY v. SOUTHERN RAILWAY COMPANY.

(Filed 22 March, 1922.)

1. **Carriers of Goods—Negligence—Evidence—Failure to Deliver—Common Carriers.**

Where the transportation of a box of merchandise has been made under a bill of lading for interstate shipment over connecting lines of common carriage, evidence that the box was empty when delivered to the consignee is sufficient evidence of negligence to take the case to the jury in an action to recover damages from the delivering carrier.

2. **Carriers of Freight — Connecting Lines — Negligence—Common-law Liability—Common Carriers.**

The common-law liability of one of several connecting carriers is ordinarily limited to negligence over its own line, with the burden of proof upon the plaintiff in the action to show facts and circumstances which change or affect such liability.

3. **Same—Contracts—Partnership.**

At common law a carrier was liable for loss or damage to a shipment of goods while in its possession with the duty to deliver it without damage to the next succeeding carrier, except for causes not due to the act of God, the fault of the shipper or the inherent nature or quality of the goods; and in the absence of any contract or partnership agreement between the carriers, or constitutional or statutory provision to the contrary, a common carrier is not required to transport goods to a point beyond its line; and whether such carrier is the initial, intermediate, or terminal one, it is ordinarily liable at common law only for such loss or damage as results from its own negligence.

4. **Same—Federal Statutes—Commerce—Principal and Agent.**

Under the provisions of the Federal statutes applying to interstate shipments of goods by a connecting line of carriage, the Carmack amendment to the Hepburn law, the receiving carrier is considered as having made a through contract, with liability for loss or injury occurring from negligence of any of the connecting lines over which the shipment may pass, as well as for loss or injury occurring on its own line, on the principle that each connecting carrier is made the agent of the receiving carrier; but where the delivering carrier is sued for the loss of a shipment, and it is established that the loss occurred on the line of the receiving carrier, a recovery may not be had for such loss against the terminal carrier.

5. **Carriers of Goods—Common Carriers—Connecting Lines—Contracts—Partnership—Negligence.**

By a special contract or partnership relation, connecting lines of common carriers between themselves may make the receiving, intermediate, or terminal carrier, or all of them, liable for loss or injury to a shipment upon whatever line the actionable negligence may occur.

CLARK, C. J., dissenting.

APPEAL by plaintiff from *Harding, J.*, at the June Term, 1921, of BUNCOMBE.

Civil action to recover damages for the loss of merchandise.

On 5 October, 1917, the plaintiffs ordered from Friedman & Company of New York a box of clothing, which was turned over to the Pennsylvania Railroad Company for transportation and delivery to the purchasers in Asheville. The Pennsylvania Railroad then issued a straight nonnegotiable bill of lading containing this provision:

"No carrier shall be liable for loss, damage, or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law, but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed." Section 2. The defendant was the terminal carrier. The agent of the defendant in Asheville collected the freight charges and delivered the box to the plaintiffs; and the box, when opened, was found to contain paper and packing, but no part of the original shipment. The plaintiffs filed with the defendant a claim for the invoice price of the goods, together with the charges for freight, and brought suit against the defendant after it had refused to make payment. The Pennsylvania Railroad is not a party to the action.

The issues were answered as follows:

"1. Did the initial carrier, Pennsylvania Railroad Company, receive from J. Friedman & Company, to be transported to the plaintiff at Asheville, North Carolina, the box containing the clothing mentioned and described in the complaint? Answer: 'Yes.'

"2. If so, was said clothing lost by reason of the negligence of the Pennsylvania Railroad Company, as alleged in the complaint? Answer: 'Yes.'

"3. If said clothing was delivered to said Pennsylvania Railroad Company, was the same lost by the negligence of the Southern Railway Company? Answer: 'No.'

"4. What damages, if any, are the plaintiffs entitled to recover of the defendant? Answer: '$292.14, with interest from 5 October, 1917.' "

The plaintiffs made a motion for judgment upon the verdict on the ground that the bill of lading constituted a contract or partnership by which the receiving carrier and the connecting lines became jointly and severally liable for the loss. The court's denial of the motion is assigned for error.

Lee & Ford for plaintiff.
Martin, Rollins & Wright for defendant.

ADAMS, J. The case was appropriately submitted to the jury on the question of the defendant's negligence. Proof that the box was empty when delivered to the plaintiffs required of the defendant an election between introducing testimony in exoneration and risking an adverse verdict on the evidence of the plaintiffs. *Meredith v. R. R.,* 137 N. C., 478; *White v. Hines,* 182 N. C., 275. But the verdict shows that the loss was due, not to the negligence of the defendant, but to the negligence of the initial carrier. The answer to the third issue exonerated the defendant from the charge of negligence. The question for decision, then, is this: Upon the pleadings and the proof in this cause, can the terminal carrier, who collected the freight charges when the shipment was delivered, be held liable in damages to the consignee for the negligence of the receiving carrier, upon bare proof of carriage on a uniform nonnegotiable bill of lading, which contains the provisions hereinbefore stated? There is no contention that the defendant incurred liability by reason of the joint or concurrent negligence of separate lines independently operated.

As a general rule, the liability of a common carrier is presumed to be its common-law liability, and any party attempting to prove otherwise carries the burden of showing facts and circumstances which change or affect such liability. *N. J. Steam Nav. Co. v. Bank,* 6 How., 344;

R. R. v. Stock Co., 136 Ill., 643; *R. R. v. Barrett,* 36 Ohio St., 448; *Jackson v. R. R.,* 23 Cal., 268; *Graham v. Davis,* 62 Am. Dec., 285; 10 C. J., 110. At common law a carrier was liable for loss or damage to property in its possession, not due to the act of God, the fault of the shipper, or the inherent nature or quality of the goods; but such carrier was bound to carry the shipment only over its own line, and to deliver it without damage to the next succeeding carrier. The English doctrine announced in 1841, in *Muschamp v. R. R.,* 8 Mees. & W., 421, has been repudiated by the Supreme Court of the United States, and by the greater number of the American courts, and the generally accepted doctrine has been stated as follows: In the absence of any contract, or partnership agreement, or constitutional or statutory provision, a common carrier is not required to transport goods to a point beyond its line, for its obligation extends only to carriage to the end of its route and delivery to the consignee or to the next succeeding carrier; and in these circumstances the carrier, whether initial, intermediate, or terminal, is liable only for such loss or damage as results from its own negligence. In *R. R. v. Myrick,* 107 U. S., 102 (decided in 1883), *Mr. Justice Field* said: "The general doctrine, then, as to transportation by connecting lines, approved by this Court, and also by a majority of the state courts, amounts to this: that each road, confining itself to its common-law liability, is only bound, in the absence of a special contract, to safely carry over its own route and safely to deliver to the next connecting carrier, but that any one of the companies may agree that over the whole route its liability shall extend. In the absence of a special agreement to that effect, such liability will not attach, and the agreement will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence." *R. R. v. Ex. Co.,* 117 U. S., 1; *R. R. v. R. R.,* 110 U. S., 667; *R. R. v. Pratt,* 22 Wall., 6; *R. R. v. Riverside Mills,* 219 U. S., 186; *McConnell v. R. R.,* 163 N. C., 504; *Phillips v. R. R.,* 78 N. C., 294; *Lindley v. R. R.,* 88 N. C., 550; *Mills v. R. R.,* 119 N. C., 694.

The plaintiffs insist, however, that this principle is not applicable here for the reason that it has been modified both by the Carmack amendment to the Hepburn law, and by the contract of the connecting carriers. It becomes material, therefore, to inquire, first, into the practical operation of the Carmack amendment in its relation to intermediate and terminal carriers. This act provides: "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property, caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: *Provided,* that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

"That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained, the amount of such loss, damage, or injury as it may be required to pay to the owners of such property as may be evidenced by any receipt, judgment, or transcript thereof." 55 Law. Ed. U. S., 178. Act 29 June, 1906; 34 St. L., 595. The "existing law" referred to is, of course, the Federal law. *Express Co. v. Croninger,* 226 U. S., 491.

Under this act, when the receiving carrier accepts an interstate shipment, it is conclusively treated as having made a through contract, and will be liable for loss or injury occurring on any connecting line over which the shipment may pass, as well as for loss or injury occurring on its own line. *Express Co. v. Croninger, supra; R. R. v. Carl,* 227 U. S., 639. This, on the principle that each connecting carrier is made the agent of the initial carrier. In *R. R. v. Riverside Mills,* 219 U. S., 204, *Mr. Justice Lurton* said, "Reduced to its final results, the Congress has said that a receiving carrier, in spite of any stipulation to the contrary, shall be deemed, when it receives property in one state, to be transported to a point in another, involving the use of a connecting carrier for some part of the way, to have adopted such other carrier as its agent, and to incur carrier liability throughout the entire route, with the right to reimbursement for a loss not due to its own negligence." *R. R. v. Wallace,* 223 U. S., 481; *Commis. Co. v. R. R.*, 262 Ill., 400; *R. R. v. Ward,* 169 S. W., 1035. By virtue of this act, the intermediate and terminal carriers are made the agents of the receiving carrier; but the act does not purport, in terms express or implied, to make any connecting line liable in damages for the negligence of the initial carrier.

The next question raised by the plaintiffs is whether, in the present case, without regard to the Carmack amendment, there was a special contract between the several carriers by which the defendant became liable for the negligence of the carrier first receiving the shipment.

In approaching the question we do not controvert the established principle that a special contract or partnership relation among connecting lines may make the intermediate or terminal carrier liable for loss or injury, whether occurring on its own line or on the line of another connecting carrier. *Barter v. Wheeler,* 6 A. Rep., 434; *Phillips v. R. R., supra; Lindley v. R. R., supra; R. R. v. Myrick, supra.*

But in the complaint there is no allegation upon which to base the application of this principle. The plaintiff does not allege either a partnership or a special contract for joint transportation. The substance of the only relevant and material allegations in the complaint is this: the goods were packed by the shippers and delivered to the receiving carrier, to be transported by it and its connecting carriers to the plaintiffs in Asheville, and the bill of lading was thereupon issued. Considered in the light of section 2 in the bill of lading, the absence of an allegation of a partnership or special contract for joint transportation is all the more marked. Without allegation, proof of such partnership or special contract is incompetent and unavailing; for in our procedure is firmly embedded the principle that proof without allegation is no less fatal than allegation without proof. *McKee v. Lineberger*, 69 N. C., 217; *McLaurin v. Cronly*, 90 N. C., 50. In these circumstances the ultimate inquiry is confined to the legal import of the bill of lading. Taken in connection with the allegations referred to, does the receipt or bill itself constitute a partnership among the connecting carriers? If, as we have seen, the Carmack amendment does not create such partnership, we must search for an answer in the relation that would have existed between the connecting lines, by virtue of the bill of lading, if this amendment had not been enacted. Under such conditions—if the Carmack amendment were not in force—the receiving carrier, when the shipment was tendered, would have had the right to contract either to carry the goods to their destination or to carry them safely over its own line only, and then to deliver them to the next carrier. In case of the latter election the next connecting carrier would have been the agent of the shipper; and in case of the former, the intermediate or terminal carrier would have been the agent of the receiving carrier. In neither event would the initial carrier have been the agent of either of the connecting lines. *R. R. v. Riverside Mills*, *supra;* 10 C. J., 518. This conclusion is fortified by the provisions of section 2 in the bill of lading. This section is not a limitation by contract of the defendant's common-law liability; for no common-law obligation devolves upon any carrier to transport goods over lines other than its own, and hence there is no common-law liability for loss or damage not occurring on its own line and not caused by its own negligence. The plaintiffs, not having alleged a partnership or special contract, did not tender an issue relating to either question. The case turned upon the issues as to negligence, and the verdict was adverse to the plaintiffs. At the trial there was neither an allegation nor an issue of a partnership or special contract, and we hold that there was no error in the judgment of the court. The plaintiffs cited *Paper Box Co. v. R. R.*, 177 N. C., 351, in support of their contention; but that case and this are entirely distinct. Indeed, the question arising in the instant case has not heretofore been presented to this Court for decision.

No error.

CLARK, C. J., dissenting: On 5 October, 1917, the plaintiffs purchased a bill of goods, $290, from Friedman & Company in New York City, who delivered the same to the Pennsylvania Railroad Company, who agreed to transport them over its own and connecting lines to Asheville, N. C., and gave the plaintiffs a bill of lading to that effect. On 3 November, 1917, the defendant Southern Railway Company delivered the box, supposed to contain the shipment of goods, to the plaintiffs, and accepted payment in full of the freight from New York City. On opening the box it was found to contain nothing but waste paper and trash. The plaintiffs filed with the defendant Southern Railway Company their claim for the value of the goods lost and freight paid. This being refused, this action was brought.

The liability of the defendant should be settled upon the right and reason of the thing as heretofore decided in several cases in this Court. The Pennsylvania Railroad Company agreed, for itself and its connecting lines, to deliver the shipment in Asheville and the defendant company ratified that contract by accepting the shipment and delivering the box to the plaintiffs and accepting payment for itself and associates of the entire freight from New York to Asheville.

It is true that the Pennsylvania Railroad Company put in the bill of lading a denial of any responsibility for default except as to carriage along its own line, but under the Carmack amendment the Pennsylvania Railroad Company is expressly made responsible and liable for the whole transit. The initial carrier could not restrict its liability against the responsibility placed upon it by virtue of the Carmack amendment, and as on behalf of itself and connecting lines it assumed a joint contract to take the shipment at New York and deliver it at Asheville it could not restrict that liability of a common carrier against the liability of any one of the lines.

In the execution of the contract to take this box of goods in New York and deliver it in Asheville no valid restriction could exempt the defendant from liability for the goods, whose shipment it accepted at the beginning of its line, and the payment of the entire freight on which it accepted at its terminal point.

A partnership cannot stipulate that it will not be liable for the misconduct or negligence of any one of its partners in the transaction of the partnership business, and still more is it against public policy that one railroad company shall undertake to receive a package in New York and transport it over its own and connecting lines to Asheville, the defendant company ratifying this contract by accepting the box for shipment, transporting it along its route, and, at its end, as agent for all the lines from New York to Asheville, collect freight and then deny all liability.

This proposition was discussed and fully settled in *Mills v. R. R.*, 119 N. C., 693, and the cases in our Reports which have followed that authority. Indeed, it has been held that in spite of any agreement to the contrary, or even where there is no bill of lading, there is a presumption that a terminal carrier who delivers the freight short or in bad order is liable. *R. R. v. Riverside Mills*, 219 U. S., 186; 31 L. R. A. (N. S.), and notes.

The defendant relies upon the headnote in *Ins. Co. v. R. R.*, 104 U. S., 146, decided in 1881, long before the Carmack amendment rendered statutory the liability of the initial carrier "that in the absence of a special contract, express or implied, for the safe transportation of goods to their known destination, the carrier is only bound to carry safely and deliver to the next carrier in the route"; but the decision in that case states that the facts found were that there was no through bill of lading, and the bill of lading also specified that the receiving company should not be liable for any damage or deficiency beyond its terminus. Since then the Carmack amendment has recognized that such contract as this is in fact a partnership agreement, and hence that the receiving carrier is responsible. This statute does not negative in any respect the decision in *Mills v. R. R.*, 119 N. C., 693, and numerous citations thereto in 2 Anno. Ed., and the Carmack amendment is wholly illogical unless it is based upon the same principle that this Court has always recognized as the basis of the decision in *Mills v. R. R., supra.*

Upon the evidence the reasonable inference arose as a matter of law that the initial carrier was the duly authorized agent of the other carriers through to the point of destination, not only because of the Carmack amendment, but upon the foundation on which that statute rested that it was a joint contract upon the bill of lading making each of the joint lines extending from New York to Asheville a member of the partnership existing *pro hac vice* for the transportation of the shipment and liable, more especially the initial carrier and the terminal carrier.

The liability of the carrier for nondelivery or damage to freight does not require proof of negligence to be made (as was required in this case) by the consignee, for the carrier is an insurer except against the acts of God or the public enemy. The court below erred in putting this burden on the plaintiff.

It would be a very great hardship in the transportation of freight for long distances, over several lines of road, if when the consignee brings suit against the last carrier in the joint contract and fails to locate the loss on that line that then it must sue the next carrier, and the next, and so on up through to the initial carrier, who was certainly made liable, not only itself, but as agent for all the others. It is easy for the joint lines, making for this occasion the continuous transportation of this shipment from New York to Asheville, to ascertain by wire or correspondence promptly, accurately and inexpensively where the default lies. It is almost impracticable for the consignee to ascertain this fact without suing in succession each member of the line, and traveling from carrier to carrier and from state to state, and employing successive lawyers to prosecute the action.

This will amount practically to a denial to the shipping public of all remedy unless the consignee should go to the expense at once of suing the initial carrier at the most distant point on the line. To require a consignee of a small shipment like this to sue in succession a half-dozen carriers in order to trace and locate the loss of this $290, or any other shipment, is a denial of justice which should not be imposed on the shipping public.

The true doctrine, as laid down in *Mills v. R. R.,* 119 N. C., 693; *Gallop v. R. R.,* 173 N. C., 21; *Paper Box Co. v. R. R.,* 177 N. C., 351, and other similar cases, is thus summed up in *Paper Box Co. v. R. R.,* 177 N. C., 351: "The various companies, which compose *pro hac vice* the through line over which any shipment passes, make a joint contract for their own convenience, or it may be a *quasi*-partnership for the occasion, by which the bill of lading is given at the point of origin by the receiving company on behalf of itself and as agent for all the others down to the place of destination, and on this joint contract any company on such line of through traffic can be sued."

Public policy and elemental principles of justice require that the consignee, for whom this transportation was received and to whom the bill of lading is given by the initial carrier on behalf of all the carriers constituting the line of transportation for the goods, should be held liable, leaving them to apportion among themselves, or ascertain on which line the loss occurred. No mere technicality, nor reference to decisions made at a time when the law in regard to liability for shipments over more than one line was in an unsettled state, should govern. The only reasonable and logical ruling, especially since the Carmack amendment has fastened liability upon the initial carrier, because it is held as acting and assuming responsibility for all the carriers, is that all the carriers on the line over which it is stipulated that a given shipment shall pass are equally liable, more especially the terminal carrier, who collected the freight and delivered the rifled package, or failed to deliver it at all, while receiving the freight. The law must conform to the modern customs and methods of transportation, and to the reason of things, for, as Coke says, "Reason is the life of the law."

This line of carriers having agreed, through its initial carrier, who is certainly responsible for them all under the Carmack amendment, that these goods should be safely transported from New York to Asheville, should be jointly and severally held liable for the failure to deliver, or for the delivery in a damaged condition, of the goods which the initial carrier agreed should be delivered in Asheville. Any other ruling will fall short of the reasoning applicable to such shipments as laid down in the cases above cited.

W. G. ALLEN v. RACHEL S. SMITH ET AL.

(Filed 22 March, 1922.)

1. **Wills — Devise— Estates—Lapsed Devises—Contingent Remainders—Deeds and Conveyances—Title.**

   Upon a devise of a life estate to the testator's son, after a devise of a life estate to his mother, with further limitation over to the testator's children, and the heirs of such as are dead, the devise to the son lapses upon his death before that of the testator, and the mother being yet alive the contingency upon which he may take the second life estate can never happen; and the title to the estate vests in the testator's children who were alive at the time of his death, either by descent or by inheritance, subject to the life estate of the mother, and a deed in proper form executed by her and by them, being the tenant for life and the remaindermen, will convey the fee-simple title absolute, upon the facts stated in the case.

2. **Wills—Devise—Estates—Life Estates—Power of Disposition.**

   A devise to the wife of all of testator's estate, "for and during her natural life to do with as she pleases and have the income therefrom," restricts her right to convey or dispose of any part of the estate, to that which she takes under the will, an estate for life.

APPEAL by plaintiff from *Devin, J.*, at the March Term, 1922, of WAKE.

This is a controversy as to the ownership of and title to the tract of land containing 242.5 acres in Swift Creek Township, Wake County, which is particularly described in the record. The ability of the defendants to convey a good and perfect title to the plaintiff in compliance with their contract depends upon the true construction of Bryant Smith's will, hereinafter set forth, Arthur E. Smith, the son of Bryant Smith, named therein, being dead and the widow of said Bryant Smith being still alive. The defendants are the children of the testator and their husbands or wives, as the case may be.

By agreement of the parties, the case was submitted to the court (Judge Devin presiding) to find the facts and declare the law thereon, and enter judgment accordingly. The facts were found by the court, and the following judgment entered, which contains a recital of the facts thus found:

The above entitled action duly and regularly coming on to be heard, and being heard, and it appearing to the court that all the defendants above mentioned have been either served with summons or have accepted service of summons, and have all been duly and properly made parties to this action and are in court, and that all of the parties, plaintiff and defendants, have waived a trial by jury and consented that the court shall find the facts and determine the law concerning the matters in controversy, and that the same may be done by the undersigned judge, either in term or out of term, and either within or out of Wake County, and the court having heard the evidence offered by the parties, hereupon the court doth find and adjudge as follows, to wit:

1. That the defendants executed the option to the plaintiff, dated 6 December, 1921, copy of which is attached to the answer.

2. That Rachel S. Smith is the widow of Bryant Smith, deceased, and D. C. Smith, C. E. Smith, Evie Morgan, Bessie Jordan, and Mollie F. Morris are the children of said Bryant Smith, deceased, and that the said Bryant Smith left a last will and testament in the words and form set forth in paragraph 4 of the complaint, as follows:

RALEIGH, N. C., 23 April, 1907.

This is my last will and testament:

I give all my estate, both and real, and wherever situated, to my wife for and during her natural life to [do] with as she pleases and have the income therefrom.

At the death of my wife, if my son Arthur E. Smith should survive his mother—I give all my estate both real and personal to him during his life, and at his death then to be equally divided among my children who then may be living—if any of my children should be dead, their heirs to inherit their share.

I want all my just debts paid and my body to have a decent burial.

I nominate and appoint my son, David C. Smith, and T. A. Smith executors hereto without bond.

His
BRYANT X SMITH.
Mark

3. That the said Bryant Smith died seized and possessed of the land described in paragraph 3 of the complaint, and being the land described in the said option hereinbefore referred to.

4. That the said Bryant Smith left him surviving his widow, the said Rachel Smith, and five children, to wit: D. C. Smith, C. E. Smith, Evie Morgan, Bessie Jordan, and Mollie F. Morris.

5. That Arthur E. Smith, the son of Bryant Smith, mentioned in the will of the said Bryant Smith, predeceased his said father.

6. That the defendants, D. C. Smith, C. E. Smith, Evie Morgan, Bessie Jordan, and Mollie F. Morris, are now seized of an indefeasible estate in fee simple in the said land, subject only to the life estate of their mother, the said Rachel S. Smith, therein.

7. That the defendants are able to convey to the plaintiff a good title to the said land, and have offered to the plaintiff a valid deed conveying to him a good, sure, and indefeasible title to the said land in fee simple.

8. That the plaintiff be and he is hereby required to accept said deed and pay to the defendants the purchase price of said land mentioned in said option, to wit: the sum of $6,300, with interest thereon.

9. That the defendants recover of the plaintiff and his surety, Daniel Allen, their costs in this action, to be taxed by the clerk of the court.

W. A. DEVIN, *Judge.*

To the foregoing judgment the plaintiff excepted, and appealed.

Templeton & Templeton for plaintiff.
R. N. Simms for defendants.

WALKER, J., after stating the facts as above: As Arthur E. Smith's life interest was contingent upon his surviving his mother, it never has, and never can, vest in him, as he failed to survive his mother. He also died before his father, and by reason of that fact the devise to him lapsed. This is conceded by the plaintiff. The contingency upon which the estate in the land was limited to the children can never happen, as it has become impossible by Arthur's death in the lifetime of his mother, and even of his father. Either one of two results must follow. The estate was thereby vested absolutely in the testator's children under the will, or they took it by inheritance from their father, and in either case they can convey a good title. The intermediate devise for life to Arthur, the son, having failed to take effect, either by lapse or by his death, in the lifetime of his mother, or before the happening of the contingency upon which it was limited, that is, his survival of his mother, it is the same as if it had never existed, and was no obstacle to the complete vesting of the remainder in the children in fee. It matters not, as we have before said, how the remainder, after the death of the widow, Mrs. Rachel Smith, vests in them, whether under the will of their father or by inheritance from him, for in either view they have the vested estate, subject only to their mother's life interest. We cannot adopt the plaintiff's contention that the contingency which would have affected the children's interest if Arthur had lived, and survived his mother, should be transferred by construction of the terms of the devises to her life estate so that only those children who outlive her will take, as they only could take had Arthur continued to live, and survived his mother. At the time of Arthur's death all the children were living, and are still living. Arthur's estate never took effect, as he did not survive his mother, and because of this contingency annexed to it, namely, that he should survive her in order for the life estate to vest in him, it never can take effect or vest in him.

This view has the advantage of executing the intention of the testator as manifestly declared in his will. His object being that his wife should have the first life estate, and if Arthur survived her, he was to have the second life estate, with remainder at his death to the testator's children who then may be living. A limitation somewhat similar to the one contained in this will will be found in 2 Underhill on Wills (Ed. of 1900), p. 731, sec. 557, and note 2. The testator evidently intended to provide for a life estate in the land to Arthur, if he outlived his mother, and if he did not, that his children should then have the remainder in fee at the death of their mother, which would be a vested one. There is nothing in the contention that by the terms of the will, and especially by the expression, "I give all my estate both (personal) and real, and wherever situated, to my wife for and during her natural life to (do) with as she pleases and have the income therefrom," the widow has the right to convey or dispose of any part of the estate, her interest being restricted to an estate during her life. *Herring v. Williams,* 158 N. C., 1. In the passage quoted above, the testator referred to her life estate and to no greater interest, as being in her, or intended to be vested in her, nor to her right to dispose of any such interest in the land.

As to the interest originally acquired by Arthur E. Smith being contingent in its nature, see *Starnes v. Hill,* 112 N. C., 1, and *Richardson v. Richardson,* 152 N. C., 705.

We agree with the court below that a deed properly executed by the defendants, and sufficient, in form and legal effect, to convey the interests of the parties to it will, when properly proved and registered, pass to the plaintiff a good and indefeasible title to the land in question.

There was no error in the judgment upon the findings of fact.

Affirmed.

IN RE WILL OF SUSAN MCKAY.

(Filed 29 March, 1922.)

1. **Executors and Administrators—Wills—Devisavit Vel Non—Evidence—Admissions.**

   Admissions of the executor are generally incompetent against the devisees, upon the issue of *devisavit vel non*, especially when those sought to be introduced were made in the lifetime of the testator and necessarily before the relationship as executor has existed, or before he was acting in a representative capacity.

2. **Same—Joint Interests.**

   The interest of an executor in the will of the deceased upon the issue of *devisavit vel non* is distinctive from that of the devisees under the will who have a joint interest, among themselves, and his declarations against their interests will not bind them, especially when those sought to be introduced in evidence were made in the lifetime of the testator.

3. **Evidence—Character—Civil Actions—Substantive Evidence—Wills—Devisavit Vel Non—Executors and Administrators.**

   Upon the trial of a civil action the evidence as to the character of the parties who have taken the witness stand in their own behalf may ordinarily be received as affecting the credibility of their testimony, or may be corroborating and impeaching in its effect, but not as substantive evidence, and an instruction upon the trial of *devisavit vel non* that evidence as to the character of the witnesses, including the caveator, who had taken the witness stand, may be received as substantive evidence, is erroneous. The reason for the application of a different rule in actions for libel and slander, and in criminal actions, pointed out.

APPEAL by propounders from *Cranmer, J.*, at July Term, 1921, of LEE.

Issue of *devisavit vel non* raised by a caveat to the will of Susan McKay. Alleged mental incapacity and undue influence are the grounds upon which the caveat is based.

The jury returned the following verdict: "Is the paper-writing propounded, and every part and clause thereof, the last will and testament of Susan E. McKay? Answer: 'No.'"

Judgment on the verdict, from which the propounders appealed.

Hoyle & Hoyle and Gavin & Jackson for propounders.
Baggett & Mordecai and A. A. F. Seawell for caveators.

STACY, J. There are two fatal errors, appearing on the record, which entitle the propounders to a new trial or to a *venire de novo*.

John Yarborough, one of the caveators, was allowed to testify, over objection, to an alleged conversation which he had had with M. M. Draughan in regard to the mental capacity of the testatrix. This conversation is alleged to have taken place during the lifetime of the deceased, and was offered as an admission or declaration against interest—the said Draughan later having qualified as executor of the will, though not named as a beneficiary therein. Up to this time the executor, who was one of the propounders, had not gone upon the witness stand; and, in fact, he did not testify at all. We think the evidence was incompetent, and that its reception was hurtful and prejudicial.

As a general rule, statements or admissions of an executor, or administrator, are not competent or admissible as against the heirs or devisees. *Davis v. Gallagher,* 124 N. Y., 487; *Marshall v. Adams,* 11 Ill., 37. Especially would this rule be applicable when the alleged declarations, as here, were made prior to the beginning of the executorship. The executor could not, then, in a representative capacity, have been engaged in the performance of a duty, pertaining to the estate, so as to make his declarations pertinent and admissible as constituting a part of the *res gestæ. Church v. Howard,* 79 N. Y., 415. As against the beneficiaries under the will, this testimony would fall in the category of hearsay evidence. Furthermore, admissions are received on the principle that they are statements against the interest of the party making them; but, in the instant case, statements made by Draughan, during the lifetime of the testatrix, could not be binding as against those claiming under the will. *Jones v. Jones,* 21 N. H., 219; Jones on Evidence, vol. 2, sec. 253. True, the personal representative may propound and defend the will in common with others, including the legatees; but, in law, his interest is of a different character from theirs. The mere fact that several persons may have a common interest, as contradistinguished from a joint interest, in a given subject-matter, does not *ipso facto* render their admissions competent against each other. This is the modern rule, and it is approved by a number of decisions in this and other jurisdictions. *Daugherty v. Taylor,* 140 N. C., 446; *Belding v. Archer,* 131 N. C., 287; *Dean v. Ross,* 105 Cal., 227; *Eakle v. Clarke,* 30 Md., 322; *Hyman v. Wheeler,* 29 Fed., 347.

Again, with reference to the evidence of the good character of some of the witnesses, his Honor charged the jury as follows: "There has been, gentlemen of the jury, evidence tending to show the good character of witnesses who have testified, and if I recall correctly, as to the caveators, some of them at least, and I instruct you that this is substantive evidence, and will be so regarded by you in your consideration and deliberation." Propounders excepted.

This charge was erroneous. Ordinarily, in civil actions, evidence of the character of parties and witnesses is admissible only as affecting the credibility of their testimony. *Lumber Co. v. Atkinson,* 162 N. C., 301, and cases there cited. Such evidence may be corroborative or impeaching in its effect; but, as a general rule, it is not to be considered by the jury as substantive proof. The rule may be otherwise in actions for libel and slander, seduction, and the like, where the character of one or more of the parties or principals is directly involved, but this is not one of those cases. For exceptions to the general rule, see *Norris v. Stewart,* 105 N. C., 455, and cases there cited.

In all criminal prosecutions, certainly those involving moral turpitude, the defendant may elect to put his character in issue, and thus produce evidence of his good reputation and standing in the community (*S. v. Hice,* 117 N. C., 782); but if this be not done, the State cannot offer evidence of his bad character unless and until he has been examined as a witness in his own behalf, and even then—the defendant not electing to put his character in issue—the impeaching testimony is permitted to affect only his credibility as a witness and not the question of his guilt or innocence. *Marcom v. Adams,* 122 N. C., 222; *S. v. Traylor,* 121 N. C., 674. Of course, in proper instances, in criminal cases, where the defendant chooses to put his character in issue, the pertinent evidence, pro and con, then becomes substantive proof, and may be considered by the jury as such. *S. v. Morse,* 171 N. C., 777; *S. v. Cloninger,* 149 N. C., 567.

For the errors, as indicated, there must be another trial, and it is so ordered.

New trial.

O. F. WHITE v. FISHERIES PRODUCTS COMPANY.

(Filed 29 March, 1922.)

1. Escrow—Bills and Notes—Negotiable Instruments—Evidence—Parol Evidence—Contracts.

The maker of a negotiable note may show, as between the original parties, a parol agreement that the payee had accepted it to be valid only upon the happening of a certain event, and in violation thereof had transferred it to an innocent purchaser for value, in due course, in his action to recover the amount of the note that he had been forced to pay to the holder, when the agreement resting in parol does not vary, alter, or contradict the written terms of the instrument.

2. Same—Vary, Alter, or Contradict.

It may not be shown by parol that a negotiable note was to be held in escrow in contradiction of its express written terms that the payee may cash it before maturity, and the maker would pay it when it should become due.

3. **Escrow—Evidence—Fraud—Appeal and Error—Questions for Jury—Evidence.**

Where there is allegation and evidence that the defendant had fraudulently negotiated a note in violation of a parol agreement that it should be held in escrow, to the loss of the plaintiff in being compelled to pay the note in the hands of a purchaser for value in due course, it is reversible error for the trial judge to refuse to submit the issue of fraud and have only that relating to the establishment of the escrow relied upon by the plaintiff, which was answered by the jury for defendant under a peremptory instruction.

APPEAL by defendant from *Calvert, J.*, at November Term, 1921, of BERTIE.

Civil action to recover damages for an alleged wrongful conversion and negotiation of plaintiff's promissory notes in violation of the understanding and agreement between the parties, that same should remain in escrow and not become operative or effective unless and until the plaintiff sold his farm for $35,000, which he never did.

From a verdict and judgment in favor of plaintiff, the defendant appealed.

Winston & Matthews and Gillam & Davenport for plaintiff.
Rountree & Carr and O. H. Guion for defendant.

STACY, J. Plaintiff alleges that on 17 June, 1920, he gave to the defendant's agent three promissory notes, aggregating the sum of $11,410, due 1 June, 1921, the same to be placed in the Bank of Colerain for safe-keeping, and, in the event the plaintiff sold his farm in Chowan County before the maturity of said notes, it was understood and agreed that he would take them up by paying the principal sum with interest and receive 761 shares of the capital stock of the Fisheries Products Company; provided further, that should the plaintiff fail to sell his farm, as above stated, the notes were to be returned and all negotiations abandoned. Instead of depositing said notes in accordance with the above understanding and agreement, it is alleged that defendant's agent wrongfully, fraudulently, and with intent to cheat the plaintiff, negotiated said notes to the Bank of Colerain, which became an innocent purchaser thereof for value, and that the plaintiff was thereby forced to pay the same at maturity, although he had not been able to sell his farm, as contemplated, and the contingency upon which the notes were to take effect, as between the original parties, had not occurred.

The law relating to conditionally delivered contracts has been sanctioned and approved by us in a number of carefully considered decisions, and it is now very generally recognized, applied, and followed in this as well as in other jurisdictions. *Farrington v. McNeill*, 174 N. C., 420;

Bowser v. Tarry, 156 N. C., 35; *Gaylord v. Gaylord,* 150 N. C., 222; *Hughes v. Crooker,* 148 N. C., 318; *Aden v. Doub,* 146 N. C., 10; *Pratt v. Chaffin,* 136 N. C., 350; *Kelly v. Oliver,* 113 N. C., 442, and *Ware v. Allen,* 128 U. S., 590. It is said in Anson on Contracts (Am. Ed.), 318: "The parties to a written contract may agree that until the happening of a condition, which is not put in writing, the contract is to remain inoperative." And again, in *Wilson v. Powers,* 131 Mass., 539: "The manual delivery of an instrument may always be proved to have been on a condition which has not been fulfilled, in order to avoid its effect. This is not to show any modification or alteration of the instrument, but that it never became operative, and that its obligation never commenced." These excerpts are quoted with approval in *Garrison v. Machine Co.,* 159 N. C., 285, where the same doctrine is announced by *Walker, J.,* in an elaborate review of the authorities on the subject now in hand.

But defendant contends that the foregoing principles are not applicable to the facts of the instant case; or, at least, that the evidence tending to bring them into operation cannot be admitted without violating other equally well known and established rules of procedure. On the back of each note, over the signature of the plaintiff, appears a printed endorsement in the following words: "To any bank or banker anywhere: This is to certify that this note is given as a cash consideration. Therefore, it will be satisfactory to me for the holder to cash this note before it is due. And I will pay same in full at maturity to the purchaser." In addition to this endorsement, there was a clause in the contract for the purchase of the stock, duly signed by the plaintiff, as follows: "No condition or agreement, other than those printed herein, shall be binding on either the seller or the buyer."

It is clear from the foregoing endorsement and stipulation, in the contract of sale, that, in the absence of any fraud or mistake, the plaintiff will not be allowed to show the oral agreement in regard to placing the notes in escrow, as this would be in direct contradiction to the terms of his written contract. "It is a rule too firmly established in the law of evidence to need a reference to authority in its support, that parol evidence will not be heard to contradict, add to, take from, or in any way vary the terms of a contract put in writing, and all contemporary declarations and understandings are incompetent for such purpose, for the reason that the parties, when they reduce their contract to writing, are presumed to have inserted in it all the provisions by which they intend to be bound." *Ray v. Blackwell,* 94 N. C., 10. And to like effect are many decisions in our reports, too numerous to be cited here.

In *Walker v. Venters,* 148 N. C., 388, the present *Chief Justice,* speaking to this question, aptly said: "It is true that a contract may be partly in writing and partly oral (except when forbidden by the statute of frauds), and that in such cases the oral part of the agreement may be shown. But this is subject to the well established rule that a contemporaneous agreement shall not contradict that which is written. The written word abides, and is not to be set aside upon the slippery memory of man." See, also, *Moffitt v. Maness,* 102 N. C., 457, one of the leading cases on this subject, and *Sykes v. Everett,* 167 N. C., 600; *Mfg. Co. v. McCormick,* 175 N. C., 277; *Bland v. Harvester Co.,* 169 N. C., 418; *Guano Co. v. Livestock Co.,* 168 N. C., 447; *Thomas v. Carteret,* 182 N. C., 374, and cases there cited.

Plaintiff also alleges that the defendant's agent procured the notes in question by false and fraudulent representations, and he seeks, in this action, to recover for the loss thus occasioned by such deceit, etc., etc. But there was no issue of fraud submitted to the jury. His Honor held that, under *Hughes v. Crooker,* 148 N. C., 318, such would not be necessary and directed a verdict for the plaintiff on a simple issue of indebtedness. This, we think, was erroneous.

Upon the instant record, unless the plaintiff can make good his allegation of fraud, it appears that his recovery must be denied.

For the error as indicated, there must be a new trial or a *venire de novo,* and it is so ordered.

New trial.

J. J. COOPER ET AL. v. BOARD OF COMMISSIONERS OF FRANKLIN COUNTY.

(Filed 29 March, 1922.)

Roads and Highways—Road Districts—Bonds—Taxation—Sinking Fund—Interest—Statutes.

Where the Legislature has created a special township road district and authorized the county commissioners to issue bonds, and for the purpose of providing for the "payment of said bonds and the interest thereon, and for the construction, improvement, and maintenance of the roads of said township," to levy a special tax of not less than 25 cents nor more than 75 cents on the $100 worth of property, the act, by the use of the words "to provide for the payment of said bonds," does not authorize a present tax levy for the accumulation of a sinking fund for the retirement of the bonds at their maturity forty years hence, but the bonds are valid. Where the commissioners have levied a tax for the purpose of creating an unauthorized sinking fund, in addition to what is required for the interest, an injunction will lie as to this difference; and the judgment of the Superior Court properly restricted the commissioners to levy a tax sufficient only for the payment of interest.

APPEAL by defendants from *Bond, J.,* at chambers at Louisburg, 15 November, 1921.

This was a proceeding to restrain the defendants from levying a higher rate for general county purposes, the poor fund and pensions, than 15 cents. On the return day of the restraining order the court adjudged that the 21 cents which had been levied on the $100 worth of property for general county purposes, the poor fund and pensions, be reduced so that the aggregate of these three charges be reduced to 15 cents, the right being reserved to the commissioners to redistribute the relative proportion of 15 cents as in their judgment is to the best interest of the county; and it was further adjudged that the levy in Sandy Creek Township for this year, purporting to be 75 cents on the $100 worth of property for road bonds, be "reduced to such amount as is required in good faith to pay the interest on said bonds," and that the poll tax levied shall also be reduced to constitutional equation between the poll tax on one side and property tax on the other.

The defendants appealed from so much of the judgment as directed that the levy of 75 cents in Sandy Creek Township for roads this year should be reduced to a sum sufficient to pay the interest on said bonds.

W. M. Person for plaintiffs.
William H. and Thomas W. Ruffin for defendants.

CLARK, C. J. The error assigned is to the ruling that the levy of taxes in Sandy Creek Township for payment on road bonds this year should be limited to the levy of a sum sufficient to pay the annual interest on the bonds. This is levied in a special taxing district after an election held under a special act of the General Assembly constituting said taxing district and creating the township road commission a corporation, with special powers and duties.

Chapter 173, Public-Local Laws 1919, created said taxing district and the township road commission for said township a corporation imposing upon it special powers and duties. Under the power thus conferred, the road commission issued and sold $50,000 of road bonds to run 40 years, and received and expended the proceeds thereof in the construction of roads. Upon the sale of said bonds the duty was imposed on the township road commission to levy a tax sufficient to pay the annual interest (but not to provide for a sinking fund) and the construction of roads not to exceed the limit voted by the citizens of the township, the maximum authorized being 75 cents on $100 worth of property. Section 10 of said act provides: "For the purpose of providing for the payment of said bonds and the interest thereon and for the construction, improvement, and maintenance of the roads of said township, the board of county commissioners of the said county shall annually, and at the time of levying county taxes, levy and lay a special tax on all persons and property subject to taxation within the limits of said township of not less than 25 cents and not more than 75 cents on the $100 worth of property."

The question presented is whether under the authority to provide for "the payment of said bonds and the interest thereon, and for the construction, improvement, and maintenance of roads of said township," the board of county commissioners can levy a tax not only to provide for the construction, improvement, and maintenance of the roads of said township and for the payment of the interest accruing on the bonds issued therefor, but whether it authorized the commissioners to levy an additional amount to accumulate a sinking fund to pay the principal not yet due. The act does not authorize the creation of a sinking fund, and that proposition was not submitted to a vote of the people of the township.

In *Lumberton v. Nuveen,* 144 N. C., 303, the act provided that the commissioners "shall levy a special tax sufficient to provide for the interest and a sinking fund."

The defendants rely upon *Hotel Co. v. Red Springs,* 157 N. C., 137, where it was held that an act authorizing a municipality to issue bonds for water and sewerage system was not invalid because at the present rate of taxation there was not sufficient revenue to raise the sinking fund to retire the bonds at maturity. The court held that the Legislature could subsequently increase the tax rate for that purpose or it might become unnecessary by reason of the growth of the town and the increase in taxable property.

In *Gastonia v. Bank,* 165 N. C., 507, it was held that where the bonds were issued by a municipality under statutory authority for necessary purposes without provision for a special levy of taxes to pay the interest and to create a sinking fund, the city has the power to pay the interest and create a sinking fund for the bonds if the general revenue derived under the limit fixing its taxing power is sufficient; and if not sufficient, the bonds will not be declared invalid on that account.

In these decisions it is not held that there is any authority to levy a tax sufficient to create a sinking fund when the act does not so specify, but merely that the bonds are valid without it.

On the contrary it was expressly held in *Comrs. v. McDonald,* 148 N. C., 125: "When bonds are issued by a county by popular vote under legislative authority, which does not further provide for a levy to exceed the constitutional limitations for principal, interest, or for a sinking fund, the commissioners are without authority to levy a tax to exceed the restriction." This case has often been cited since with approval. See citations to that case in the Anno. Ed.

As suggested in *Hotel Co. v. Red Springs, supra,* the Legislature may have thought proper to leave the collection of taxes for the sinking fund to some future Legislature, and it is a very doubtful question whether the creation of a sinking fund for that purpose is sound public policy for, as counsel for the plaintiffs observed, a "sinking fund has very often proven to be a sunken fund," and it is also doubtful whether in the present financial condition of the country and the pressure of high taxes it is advisable to anticipate the payment of the principal of this indebtedness by the collection of a fund at the present day, which (if not lost) shall meet the payment of the principal at some future day when the people of the township at the maturity of the bonds will be far more numerous and better able financially to meet that payment, if they do not prefer to renew the bonds. It is said that no part of the bonded indebtedness of this State has ever really been paid, but has always been renewed from time to time at maturity of the indebtedness.

But at any rate, the language of the statute, section 10, provides: "That for the purpose of providing for the payment of said bonds and the interest thereon, and for the construction, improvement, and maintenance of the roads of said township, the board of county commissioners of the said county shall annually, and at the time of levying county taxes, levy and lay a special tax on all persons and property subject to taxation within the limits of said township of not less than 25 cents and not more than 75 cents." To same purport are sections 9 and 15 of the act. The purpose for which the levy of said tax is specified to be the construction, improvement, and maintenance of the roads of said township. The act provides that the taxation shall be used to provide for the payment of said bonds, but this means at maturity and is not a requirement that taxes shall be levied now sufficient in amount to provide for the creation of a sinking fund in anticipation of the maturity of the bonds. The interest is to be paid each year as it falls due, nor can the principal be called for until due. Its payment is to be met when the bonds become due, and not at the present time, long years before their maturity. When the bonds fall due, 40 years from date, the wealth of the township may be such as to make the tax sufficient for the payment of the principal. The people of that day—40 years hence—can better take care of their own affairs than this generation. They may see fit to renew the bonds as the State and many other municipalities have done heretofore, or they may pay them as they may see fit.

If the Legislature had intended that the levy should be sufficient not only to provide for the purposes named in the act, "the interest on the bonds and the construction, improvement, and maintenance of said roads," but there should be a levy yearly to accumulate out of this generation a fund sufficient for the payment of the principal of the bonds 40 years hence, it would doubtless have adopted a plan now recognized as far safer than a sinking fund of issuing "serial bonds" so that some of the principal shall fall due and be paid each year.

"Without legislative authority a sinking fund could not be created," *Hightower v. Raleigh,* 150 N. C., 571; *Jones v. New Bern,* 152 N. C., 65; nor can a tax be levied even to pay interest unless so specified and authorized, though this would not make the bonds invalid. *Underwood v. Asheboro, ibid.,* 642; *Pritchard v. Comrs.,* 160 N. C., 479; *Jackson v. Comrs.,* 171 N. C., 382. In *Proctor v. Comrs.,* 182 N. C., 56, the creation of a sinking fund was required by the act.

The Legislature has not seen fit in this act by the device of serial bonds to provide for the levy of taxes to pay any part of the bonds each year, and as the creation of a sinking fund is not named as one of the purposes authorized by the statute or by vote of the people, we think his Honor was correct in restricting the taxes to be levied to the purposes named in the act and held that the levying purporting to be "75 cents on the $100 worth of property for the purpose of paying bonds should be reduced to such an amount as is required in good faith to pay the interest on said bonds." In this case neither the statute nor the popular vote authorizes a sinking fund. The bonds are valid, but no levy can be made to create a sinking fund.

Affirmed.

HOKE, J., dissenting: I dissent from so much of the opinion as denies the power to levy a tax for a sinking fund, the amount being within the 75 cents authorized by statute and approved by the voters. I am of opinion that there is ample power conferred to levy this tax in question, and that the same is being providently exercised by the commissioners.

In the cases cited, so far as examined, no power to levy a special tax existed.

NONIE B. HARRIS, ADMINISTRATRIX OF J. C. HARRIS, v. P. H. MANGUM.

(Filed 29 March, 1922.)

1. **Negligence—Evidence—Res Ipsa Loquitur.**

Ordinarily in an action by the plaintiff to recover damages for a personal injury alleged to have been caused him by the defendant's negligence, he must prove circumstances tending to show some negligent fault of omission or commission in relation to a duty owed to him by the defendant, in addition to the happening of the physical accident; and where the doctrine of *res ipsa loquitur* applies, it is distinctive in permitting negligence to be inferred by the jury from the physical cause of an accident, without the aid of circumstances as to the responsible human cause.

2. Same—Master and Servant—Employer and Employee—Steam Boilers.

The application of the doctrine of *res ipsa loquitur* does not depend upon the relationship of the parties to each other, such as, in this case, employer and employee, but in the inherent nature and character of the act causing the injury, as where the thing causing the injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care; and under such circumstances a bursting of a boiler, in the absence of explanation, is evidence of negligence to be considered by the jury.

3. Same—Burden of Proof—Questions for Jury—Trials.

The *prima facie* case of negligence established by the proper application of the doctrine of *res ipsa loquitur*, in a given case, is only evidence for the consideration of the jury, and the defendant may elect whether he will or will not introduce evidence in explanation, or in rebuttal of the plaintiff's case.

4. Same—Instructions—Appeal and Error—Prejudicial Error.

Where there is evidence that the plaintiff, defendant's employee, was injured by the explosion of a boiler under circumstances permitting the application of the doctrine of *res ipsa loquitur*, an instruction that the law raised a presumption of the defendant's negligence that shifted to it the burden of showing that the explosion was not negligently caused, is prejudicial error, in imposing upon it the burden of disproving negligence, contrary to the rule that the burden remains on the plaintiff throughout the trial to prove by the preponderance of the evidence that the defendant's negligence was the proximate cause of the injury alleged.

APPEAL by defendant from *Bond, J.*, at the November Term, 1921, of WAKE.

Civil action for the recovery of damages for the wrongful and negligent death of plaintiff's intestate, tried by *Bond, J.*, and a jury, at the October-November term of the Superior Court of Wake. The intestate was standing near a steam boiler used by the defendant in the operation of a sawmill when the boiler exploded, causing the death of the intestate. There was evidence for plaintiff tending to show that her intestate was an employee of the defendant, and evidence for defendant tending to show that he was not. The jury found that the intestate was such employee, answered the issue of negligence in favor of the plaintiff, and assessed damages. The defendant appealed.

R. N. Simms, J. H. Finlator, and R. L. McMillan for plaintiff.
Armistead Jones & Son and H. E. Norris for defendant.

ADAMS, J. Applying the doctrine of *res ipsa loquitur* to the cause of the intestate's death, his Honor instructed the jury as follows: "The defendant having admitted that an explosion occurred, the law raises a presumption that the explosion was due to negligence, and shifts upon the defendant the burden of showing that the explosion was not negligently caused." This instruction the defendant assigns as error, and in our opinion his exception should be sustained. The verdict, considered in reference to his Honor's charge, established as between the defendant and the intestate the relation of master and servant. In a large body of decisions, especially in those of the Federal courts, the maxim *res ipsa loquitur* is not applied in actions arising from the relation of master and servant, although, says Labatt, no satisfactory reason is given why in such cases it should not apply. Mas. and Ser. (2 ed.), 1601. Some of the courts, emphasizing the peculiar contract of the employee who ordinarily assumes the risks incident both to his employment and to the negligence of his fellow-servants, deny the applicability of the maxim in its strict and distinctive sense. To what extent these decisions may be affected by the abrogation of the common-law doctrine of fellow-servants in the enactment of the Federal Employers' Liability Act is not germane to this discussion. *Jones v. R. R.,* 176 N. C., 260. Other courts, which do not exclude the rule in causes between master and servant, nevertheless confine its application to a scope more limited than that which is generally recognized in the case of carrier and passenger. In a number of decisions rendered in this jurisdiction it is held that the maxim applies to causes originating in the relation of master and servant. *Kinney v. R. R.,* 122 N. C., 961; *Wright v. R. R.,* 127 N. C., 225; *Womble v. Grocery Co.,* 135 N. C., 474; *Ross v. Cotton Mills,* 140 N. C., 115; *Hemphill v. Lumber Co.,* 141 N. C., 488; *Fitzgerald v. R. R., ibid.,* 531.

In applying the maxim confusion has frequently arisen from a failure to observe the distinction between circumstantial evidence and the technical definition of *res ipsa loquitur.* This distinction is not merely theoretical; it is practically important. *Res ipsa loquitur,* in its distinctive sense, permits negligence to be inferred from the physical cause of an accident, without the aid of circumstances pointing to the responsible human cause. Where this rule applies, evidence of the physical cause or causes of the accident are sufficient to carry the case to the jury on the bare question of negligence. But where the rule does not apply, the plaintiff must prove circumstances tending to show some fault of omission or commission on the part of the defendant in addition to those which indicate the physical cause of the accident. *Fitzgerald v. R. R.,* 6 L. R. A. (N. S.), 337, and note; *Byers v. Steel Co.,* 16 L. R. A. (N. S.), 214, and note.

We are not inadvertent to decisions in which it is held that the doctrine of *res ipsa loquitur* does not apply in case of injury or death caused by the explosion of a boiler; but in our opinion the better reasoning, as well as eminent judicial opinion, supports its application. The principle is embedded, not in the relation existing between the parties, but in the inherent nature and character of the act causing the injury. "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care." *Scott v. London Co.,* 3 H. & C., 596; Shear. and Red. on Neg. (6 ed.), sec. 58 b. When in safe condition and properly managed, boilers do not usually explode; therefore, in the absence of explanation, the bursting of a boiler justly and reasonably warrants an inference of negligence. *Rose v. Trans. Co.,* 20 Blatchf., 411; *Mullen v. St. John,* 15 Am. Rep., 530; *Young v. Bransford,* 12 Lea (Tenn.), 232; *Judson v. Powder Co.,* 48 Cal., 146; *Beall v. Seattle,* 61 L. R. A., 593; *Lykiardopoulo v. New Orleans,* Anno. Cases, 1912 A, 976; *Newton v. Texas Co.,* 180 N. C., 561; *Stone v. Texas Co., ibid.,* 546. We hold, then, upon the present record, that the plaintiff had a right to invoke in aid of her action against the defendant the doctrine of *res ipsa loquitur.*

In our opinion, however, his Honor's instruction is subject to the criticism of imposing upon the defendant the burden of disproving negligence. *Furniture Co. v. Express Co.,* 144 N. C., 639; *Stewart v. Carpet Co.,* 138 N. C., 61; *Ross v. Cotton Mills, supra; Womble v. Grocery Co., supra; Overcash v. Electric Co.,* 144 N. C., 573; *Page v. Mfg. Co.,* 180 N. C., 335. In the last of these cases *Walker, J.,* said: "It is true that expressions are to be found in some of our cases, filtered there from two or three cases based on the English rule, which justified his Honor's charge, but since they were decided we have adhered to the true and correct rule, which is stated in *Stewart v. Carpet Co., supra; Womble v. Grocery Co., supra; Cox v. R. R., supra; Shepard v. Tel. Co., supra,* and many other cases, and which we have applied in this case, the substance of which is that the burden to prove his case is always on the plaintiff, whether the defendant introduces evidence or not. Where we have said 'it is the duty of the defendant to go forward with his proof,' it was only meant in the sense that if he expects to win it is his duty to do so or take the risk of an adverse verdict, and not that any burden of proof rested upon him. He pleads no affirmative defense, but the general issue, and this puts the burden throughout the case on the plaintiff, who must recover, if at all, by establishing his case by the greater weight of evidence. The Supreme Court of the United States has so stated the rule, and it referred with approval to our cases above cited. We say this much again, in the hope that the rule, as we have stated it, may hereafter be considered as the correct one."

For the purpose of calling attention to inconsistent expressions in some of the decisions of this Court we undertook at the last term to review the cases in which the burden of the issue and the "burden of proof" are discussed. *White v. Hines*, 182 N. C., 275. The origin of these inconsistencies may perhaps be found in the application against the defendant of the words "presumption" and "burden of proof." In some of the decisions the word "presumption" seems unfortunately to imply the right of the plaintiff to recover unless the defendant introduces evidence in rebuttal, and to this extent assumes the burden of proof; whereas, the "presumption" is nothing more than evidence to be considered by the jury. Here the plaintiff could have rested her case as to the first issue upon proof of the explosion, and her intestate's death as the proximate result; and in that event it would have devolved on the defendant to elect between introducing and declining to introduce evidence, because, although the maxim referred to was applicable, the explosion and consequent death were only evidence from which the jury in the exercise of their reason might or might not have inferred negligence. The burden of proving by the greater weight of the evidence the explosion, the death, and the proximate cause remained with the plaintiff throughout the trial, and the burden of disproving negligence was not at any time cast upon the defendant.

In *White v. Hines, supra*, 288, it is said: "When the plaintiff proves, for instance, that he has been injured by the fall of an elevator, or by a derailment, or by the collision of trains, or other like cause, the doctrine of *res ipsa loquitur* applies, and the plaintiff has a *prima facie* case of negligence for the consideration of the jury. Such *prima facie* case does not necessarily establish the plaintiff's right to recover. Certainly, it does not change the burden of the issue. The defendant may offer evidence or decline to do so at the peril of an adverse verdict. If the defendant offer evidence the plaintiff may introduce additional evidence, and the jury will then say whether upon all the evidence the plaintiff has satisfied them by its preponderance that he was injured by the negligence of the defendant." . . .

"As applicable to this class of cases, the rule formulated by the more recent decisions of this Court is substantially as follows: In all instances of this character, after the plaintiff has established a *prima facie* case of negligence, if no other evidence is introduced, the jury will be fully warranted in answering the issue as to negligence in favor of the plaintiff, but will not be required to do so as a matter of law. When such *prima facie* case is made, it is incumbent upon the defendant to offer proof in rebuttal of the plaintiff's case, but not to the extent of preponderating evidence. The defendant, however, is not required as a matter of law to produce evidence in rebuttal; he may decline to offer evidence at the peril of an adverse verdict. If he offer evidence, the plaintiff may introduce other evidence in reply, and the jury will finally determine whether the plaintiff is entitled by the greater weight of all the evidence to an affirmative answer to the issue; for throughout the trial the burden is upon the plaintiff to show by the greater weight of the evidence that he is entitled to such answer."

It may not be improper to direct attention to his Honor's further instruction that the law raises a presumption that the explosion was due to negligence. There are decisions which apparently sustain the instruction; but again we find that certain of the decisions are inharmonious, if not directly conflicting. For example, it has been held that in case of derailment or the collision of trains, in which the doctrine of *res ipsa loquitur* applies, the law raises a presumption of negligence (*Stewart v. R. R.*, 141 N. C., 277; *Hemphill v. Lumber Co., ibid.*, 488); in others that the maxim does not create a presumption, but merely carries the question of negligence to the jury (*Fitzgerald v. R. R., ibid.*, 542; *Womble v. Grocery Co., supra; Ross v. Cotton Mills, supra*); and in *Cox v. R. R.*, 149 N. C., 118, it was held that an instruction that there was a "presumption in law of negligence" was erroneous in that it raised a legal presumption of the defendant's liability and shifted the burden of proof to the defendant.

We hold that where the doctrine of *res ipsa loquitur* applies the plaintiff has a *prima facie* case of negligence; but such *prima facie* case is not a presumption of law, but simply evidence from which the jury may or may not infer that the issue should be answered in favor of the plaintiff. The duty, then, imposed on the defendant is to elect between introducing or declining to introduce evidence in explanation or rebuttal.

We deem it unnecessary to consider the remaining exceptions.

For the reasons stated, the defendant is entitled to a new trial. *Cotton Oil Co. v. R. R., ante*, 95.

New trial.

S. M. HOBBY v. MRS. PATTIE D. B. FREEMAN.

(Filed 29 March, 1922.)

1. **Landlord and Tenant—Possession by Tenant—Ejectment—Title.**

The tenant continuing in possession of the premises under a lease from the landlord may not deny the latter's title, without first surrendering the possession, by setting up a superior outstanding title in himself, or in some third person; and the principle upon which the tenant may dispute the derivative title of one claiming under the landlord, does not arise upon this appeal.

2. **Same—Justices of the Peace—Jurisdiction—Exceptions—Appeal and Error—Objections and Exceptions.**

Where the original jurisdiction of a justice of the peace, in a possessory action of ejectment, has not been excepted to in the tenant's appeal, the question of title is not raised for adjudication in the Superior Court, or properly presented on the tenant's appeal to the Supreme Court.

APPEAL by defendant from *Bond, J.*, at second October Term, 1921, of WAKE.

Summary proceeding in ejectment to evict the defendant, a tenant, from the premises of the plaintiff.

Upon trial in Superior Court, there was a verdict and judgment in favor of plaintiff, from which the defendant appealed.

J. L. Emanuel and E. P. Maynard for plaintiff.
Mrs. Pattie D. B. Freeman, in propria persona, for defendant.

STACY, J. This was a summary proceeding in ejectment, commenced in the court of a justice of the peace, and tried *de novo* on appeal to the Superior Court of Wake County. From the judgment of the latter court the case comes to us for review.

The tenancy and the expiration of the term are both admitted (C. S., 2365); but defendant refuses to vacate the premises upon the ground that, although having taken possession under a lease, she has now acquired an outstanding claim to the property superior to the plaintiff's right and superior to her original landlord's title. It has been the uniform holding with us that where the relation of landlord and tenant exists, and the latter takes possession of the demised premises under a lease from the former, the tenant will not be permitted to dispute the title of the landlord, either by setting up an adverse claim to the property or by undertaking to show that it rightfully belongs to a third person, during the continuance of such tenancy. *Clapp v. Coble*, 21 N. C., 177. Before the defendant here could avail herself of this position it would be necessary for her first, and as a condition precedent, to surrender the possession which she had thus acquired under the lease. The reasons in support of the wisdom of such a policy are fully set forth by *Hoke, J.*, in *Lawrence v. Eller*, 169 N. C., 211, where the question is discussed at some length with citation of numerous authorities.

We may add, however, that this principle does not go to the extent of denying to the tenant the right to dispute the derivative title of one claiming under the landlord. *Hargrove v. Cox*, 180 N. C., 360, and cases there cited; 16 R. C. L., 670. But this is not our case; and there is no exception calling in question the original jurisdiction of the justice of the peace. *Hauser v. Morrison,* 146 N. C., 248; *McLaurin v. McIntyre,* 167 N. C., 350.

Upon the instant record we have found no error, and the judgment of the Superior Court must be upheld.

No error.

IN RE BLANCHE McCADE.

(Filed 29 March, 1922.)

Habeas Corpus—Appeal and Error—Certiorari—Courts—Discretion.

An appeal will not lie upon the refusal of the judge, in *habeas corpus* proceedings, to release a prisoner from custody upon the ground that the judgment ordering her imprisonment was invalid, such procedure being only allowable when concerning the care and custody of children and otherwise by application for a writ of *certiorari,* the granting of which rests on the sound discretion of the court.

HABEAS CORPUS proceedings, heard and determined on petition of Blanche McCade, before *Bond, J.,* at Raleigh, N. C., on 30 November, 1921.

The court entered judgment denying the prayer of the petitioner and remanding her to custody, whereupon petitioner excepted and appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Charles U. Harris for petitioner.

HOKE, J. It appears that the petitioner, Blanche McCade, being imprisoned in the common jail of Wake County under a sentence in a criminal action, sued out the writ of *habeas corpus,* alleging the invalidity of the judgment against her for causes specified. His Honor, on inspection of the record, and other evidence offered, being of opinion that petitioner was under a lawful sentence, entered judgment in denial of the prayer of the petitioner and that she be remanded to jail.

It is the law of this State that except in cases concerning the care and custody of children, no appeal lies from a judgment in *habeas corpus* proceedings, but the same must be reviewed, if at all, on writ of *certiorari,* duly applied for and resting in the sound discretion of the court. *In re Lee Croom,* 175 N. C., 455; citing *Ice Co. v. R. R.,* 125 N. C., 17, and *In re Holley,* 154 N. C., 163.

In deference to these and other like decisions, we must hold that the appeal of the petitioner be dismissed.

Appeal dismissed.

EMILY T. PETERSON ET AL. v. TIDEWATER POWER COMPANY.

(Filed 29 March, 1922.)

1. **Negligence—Evidence—Questions for Jury—Fires.**

The defendant, at the beginning of the season at a summer resort, took the plaintiff's keys to connect up the gas, which had been cut off, and as was the custom, lighted the gas with matches after connection made to test whether it was working satisfactorily. There was evidence tending to exclude any probability of fire except that used in the testing by defendant's employees; and that an hour or two after they left, witnesses seeing smoke from the dwelling, broke into it and saw large flames of gas from the gas piping where the defendant's agents had been at work, which caused the conflagration resulting in the loss of the dwelling: *Held*, sufficient evidence of defendant's actionable negligence to sustain a verdict in the plaintiff's favor.

2. **Evidence — Negligence — Damages — Tax Lists—Hearsay—Res Inter Alios Acta.**

Where the amount of the plaintiff's damage for the negligent burning of the plaintiff's dwelling is at issue, the amount on the tax list given by the plaintiff's predecessor in title is not admissible as tending to show the value of the building destroyed, it being but hearsay and *res inter alios acta*, and not the estimate of value given by the plaintiff.

3. **Appeal and Error—Unanswered Questions—Negligence—Damages—Evidence—Dwellings—Values—Questions for Jury—Trials.**

Where the value of a building destroyed by fire is relevant to the inquiry in an action to recover damages, the value of another building which had theretofore stood on the same site, is competent as a circumstance to be considered by the jury, when there was evidence that the two were substantially identical with each other; but where the answer to the question is not given, the question will be held as harmless.

4. **Damages—Fires—Rules of Insurance Companies—Negligence.**

The rules of insurance companies relative to placing insurance upon a certain class of dwellings is not competent on the inquiry as to the value of a dwelling of that class destroyed by fire, which is the subject of the plaintiff's action to recover damages of the defendant for its negligence in causing the loss.

APPEAL by defendant from *Connor, J.*, at the October Term, 1921, of NEW HANOVER.

This was a civil action, brought by the plaintiffs to recover damages of the defendant for the alleged negligent burning by the defendant of the *feme* plaintiff's cottage and furniture at Wrightsville Beach.

At the trial the defendant admitted the plaintiff's ownership in fee simple of the lands and premises described in the complaint, but required the plaintiffs to put in the deed which showed the purchase price of the property alleged to have been destroyed through the negligence of the defendant.

The defendant admitted in the pleadings that it was a corporation, engaged in the business of supplying the town of Wrightsville Beach and persons along its system with electricity for lights, power, and gas for lighting, heating, cooking, and other purposes, charging its usual rates for gas and electricity. That upon the tract of land described in the complaint was a summer residence or cottage, which was not occupied during the winter months, but occupied only during the summer months, and that the plaintiff had household and kitchen furniture for living purposes in said cottage, and was preparing to move down and occupy said cottage for the summer season, expecting to begin such occupancy on 3 June, 1920.

That it was the custom of the company to cut off its supply of electricity and gas to cottages in the early fall by disconnecting, in some manner, the supply of gas and electricity from such cottages at the main pipe and wires feeding said cottages, and that before gas and electricity were turned into the cottages they required the owner, or persons expecting to occupy such cottages to make application to the defendant for connecting up and turning on the gas and electricity, and required the keys to the cottage to be surrendered to the defendant, so that they might enter the same and inspect the meters and connect with the supply of electricity and gas, which had been disconnected the previous fall.

That on 31 May, 1920, application was made for gas service for the plaintiffs' cottage, and the keys to the same were turned over to the defendant, to enable it, or its agents, or servants, to enter such cottage and connect up the gas fixtures so that the plaintiffs could use and consume gas according to their needs for cooking and heating purposes, and that the plaintiffs paid the defendant its charges for such service. That it was the custom of the defendant immediately after making the necessary connections, to turn on the flow of gas and light the same in order to ascertain whether or not its patrons would be able to receive the expected service. That in disconnecting the gas in the fall, the defendant's custom was to disconnect the metal or iron pipe which conducted the gas through the meter at some point inside the building, near where the pipe entered the meter, and this was the method used in the plaintiff's cottage.

That on 1 June, 1920, between the hours of 11 and 12 o'clock a. m., before the plaintiffs had moved into said cottage, the defendant's servants or employees entered said cottage to connect up, test out, and put in proper condition the gas fixtures for use by the plaintiff, and that in a very short time after the defendant's employees had left the cottage, fire was discovered in the kitchen or rear part of the cottage, at and around where the defendant's employees had been working and connecting the s, and that gas from the defendant's pipe was pouring out into said ttage a burning flame, and the plaintiff's cottage and furnishings were mpletely destroyed and consumed by the said fire.

The foregoing facts are substantially admitted in the pleadings, the ly denials of the defendant being that as to negligence and the value the property destroyed by the fire, the defendant stating, in the ninth ragraph of its answer, that it was probably more than an hour after fendant's employees left the house before the fire was discovered.

The evidence tended to show, in addition, that when Mr. Peterson ved out of the cottage the previous fall, all matches and combustible aterials had been removed from the cottage. That Mr. Peterson, out a week previous to the fire, and before he surrendered the keys to defendant company, for the purpose of connecting up the gas and ctricity, visited the cottage and left the same securely locked and stened, and that there was no fire in the cottage. That the defendant's ployees, during the morning, about 12 o'clock, entered the cottage th the keys to install the meter and connect the gas in the kitchen, d this they did, and after doing so, lighted the gas to test it out. ere is no evidence that any other person from that time until the fire s discovered, was in, at, or around the plaintiff's cottage. That Mrs. terson left Lumina on the 1:15 car and went to visit Mrs. Colucci, o was occupying the cottage next to Peterson's, and after she had en on the porch for a few minutes she heard a noise in the Peterson tage, which sounded like that made when she turned on the gas in gas range and put the match to it, when it doesn't catch, making a zzling noise," and she called the attention of Mrs. Colucci to the ne. A few minutes thereafter she saw fire coming out of the weather-arding, where a few minutes before she had seen smoke coming from cottage. She tried the doors and found them locked, and could not in. The kitchen door was then forced open and flames were found rning around the gas meter. The noise which she heard when she st called Mrs. Colucci's attention to it was like that of gas coming of a pipe.

John Cowan testified that when the door was broken open all he could was an arm of flame coming out with a hissing sound.

Mrs. Jacobs testified that the meter was near the gas stove and a long ne was coming out, making a "sizzling sound," and that she heard the se before the cottage was broken into.

The cottage and its contents were totally destroyed by the fire.

. K. Bryan for plaintiffs.
ountree & Carr for defendants.

WALKER, J. We are of the opinion that the testimony of the witnesses tended to show that before the defendant's servants entered the cottage for the purpose of connecting the house fixtures with the main outside, so as to furnish a supply of gas for domestic uses, Mr. Peterson, one of the plaintiffs and owners of the cottage, had gone into it and upon leaving the cottage he securely locked and fastened the same, and there was no fire in there. It further appears by the testimony that there was nothing in the house that would cause a fire, until the defendant's employees entered it to do the work the defendant had ordered them to do. Soon after the workmen had finished—or supposed they had—fire broke out and consumed the cottage. No one, so far as appears, entered the building from the time the workmen left it until the fire was first discovered, by neighbors, coming through the weatherboarding and the roof. A door of the kitchen—where defendant's servants had been working an hour or two before, at the gas meter—was broken open and flames "were coming out of the gas pipe of the meter in the kitchen," with a hissing sound. The kitchen was so full of smoke that another witness could not tell where the flame was coming from. The fire was in that part of the house, or kitchen, where the work had been done an hour or so before. How long it was after the workmen left the building and the first appearance of the fire was not definitely fixed, but it was not so long as to exclude altogether the reasonable inference, which the jury could draw, that the cause of the fire, and the only probable cause, under the circumstances, was some negligent act committed by the workmen, in connecting the pipes. *McRainey v. R. R.,* 168 N. C., 570. There was some evidence that they used matches in making tests to discover if there was any escaping gas, and the jury, under the evidence, would be warranted in finding that the fire was started by the careless handling of the matches. It was competent and proper for the jury to consider the testimony of Hufham and Burt Kite, and other testimony of a similar kind, as to how the work of connecting the pipes, and especially the testing of them, was done, as affording some evidence in support of plaintiffs' allegation and contention that the fire originated in the house from some cause attributable to the manner in which the work was done by defendant's employees, or to their negligent conduct.

We are fully aware of the rule stated in *Byrd v. Express Co.,* 139 N. C., 273, that the proof of negligence causing damage must be of such a nature as to reasonably warrant an inference of the fact required to be established, and must be more than merely conjectural, but we do not think that the evidence in this case falls within the class which we there excluded as insufficient to be considered by the jury, as there is some testimony here which reasonably tends to prove the act of negligence. There is evidence from which the jury could reasonably infer that all other causes for the fire had been eliminated, leaving none but those attributable to defendant's want of care, or that of its employees, which is the same thing.

Our last observation is an adequate answer to the position taken by the defendant that there is no proof of the origin of the fire, or any which tends reasonably to show that it is imputable to the defendant's negligence, or that of its servants engaged at the time in doing the work of connecting the pipes in the house for it, and the cases cited by the defendant in its brief to sustain its position are not applicable to the facts of this case, while the principle of law stated in them is admitted to be correct.

There was no error in the ruling of the court by which the tax lists, as evidence of the true value of the property, were excluded. Williams owned the property when the lists were made up, and not the plaintiffs. It would be competent to show any estimate of its value made by the plaintiffs, but that was not what was proposed to be done. It was therefore hearsay (*res inter alios acta*), and incompetent. *Ridley v. R. R.,* 124 N. C., 37; *R. R. v. Land Co.,* 137 N. C., 330; *Hamilton v. R. R.,* 150 N. C., 193; *Powell v. R. R.,* 178 N. C., 243, at p. 249. What is said in the case last cited, at page 249, is pertinent: "The court excluded the circumstances that where the official board of valuation had assessed property at a higher rating after the alleged injury, the then owner, ancestor in title of the present plaintiff, appeared before them and endeavored to have same reduced. So far as the action of the board of assessors was concerned it has been generally ruled irrelevant on the question of valuation. *Hamilton v. R. R.,* 150 N. C., 193. And as to the action of the plaintiff's predecessor in title, his action as indicated tended to favor his own position on the issue, and its exclusion could in no sense be held to have prejudiced defendant's case." This fits our case exactly.

The estimate of the witness Peterson, as to the value of the property destroyed, was permitted to be considered by the jury, not for the purpose of showing that the old cottage and the new cottage built on the same site were of the same value, but a substantial identity in the construction of the two having been first shown, it was allowed to go to the jury merely as a circumstance, to be considered by them, in finding the amount of loss or damage, and admitted, as it was, with this restriction, we think it was competent. The learned judge carefully guarded his ruling by requiring that the two buildings must have been substantially alike, in order for them to consider the value of the one as a circumstance bearing upon the value of the other, and not as being of the same value. This evidence was allowed to be considered by the jury, we suppose, upon the authority of *Belding v. Archer,* 131 N. C., 287, and

Powell v. R. R., 178 N. C., at pp. 248 and 249, citing R. C. L., pp. 175-176. Such evidence, when confined within its proper limits, should not be objectionable, as said in the last cited case. But the witness did not answer the question, nor are we informed what his answer would have been if he had been permitted to answer the same. It was therefore harmless, as we have so often held.

We do not see how the rules of the insurance companies relative to placing insurance on beach property was at all relevant or competent.

The other exceptions are without any merit, and, upon the whole case, after a careful review of it, we find no ground for disturbing the judgment of the court below.

No error.

STACY, J., took no part in the consideration and decision of this case.

HOLLY SPRINGS LAND AND IMPROVEMENT COMPANY v. W. L. BREWER.

(Filed 5 April, 1922.)

Trials—Nonsuit—Evidence—Questions for Jury.

In this action, involving the right of plaintiff to cut certain timber on lands of defendant, alleged by the latter to be under the size called for in the former's conveyance, *it is held* that a judgment as of nonsuit was improvidently entered upon the evidence.

APPEAL by plaintiff from *Connor, J.*, at the second May Term, 1921, of WAKE.

At the conclusion of plaintiff's evidence, his Honor rendered judgment of nonsuit. Plaintiff excepted and appealed.

P. J. Olive, Little & Barnes, and J. W. Bailey for plaintiff.
H. E. Norris and Armistead Jones & Son for defendant.

ADAMS, J. It is alleged in the complaint that on 17 February, 1916, I. D. Royal and his wife executed and delivered to the plaintiff a deed conveying certain timber situated on the land therein described, and that after the registration of the deed these grantors conveyed a part of said land to the defendant. It is also alleged that for the purpose of acquiring title to a portion of the plaintiff's timber the defendant has endeavored to hinder and delay the plaintiff in removing it, and to this end has threatened and intimidated the plaintiff's employees, and with evil intent has had one of them arrested and prosecuted for an alleged breach of the criminal law, and otherwise has wrongfully obstructed the plaintiff's right of removal. The defendant denies the material allegations of the complaint, and alleges that the plaintiff has wrongfully cut and removed a large quantity of timber of dimensions smaller than the plaintiff's deed specifies, and has otherwise damaged the land.

It is unnecessary to analyze the testimony of the plaintiff's witnesses, which covers about twenty-four pages of the record; but a careful perusal of the evidence considered in the light most favorable to the plaintiff leads us to the conclusion that the jury should have been permitted to determine the controversy between the parties. *Daniels v. R. R.*, 136 N. C., 517; *Freeman v. Brown,* 151 N. C., 111; *Morton v. Lumber Co.,* 152 N. C., 54; *Christman v. Hilliard,* 167 N. C., 4; *Collins v. Casualty Co.,* 172 N. C., 543; *Rush v. McPherson,* 176 N. C., 563; *Newby v. Realty Co.,* 182 N. C., 34. The judgment of nonsuit is reversed, and this will be certified for further proceedings.

Reversed.

G. A. P. BOWMAN v. FIDELITY TRUST AND DEVELOPMENT COMPANY ET AL.

(Filed 5 April, 1922.)

1. **Trials—Arguments of Counsel—Court's Discretion—Appeal and Error.**

Where the defendant admits the contract sued on, and relies upon its cancellation by the mutual agreement of the parties, the burden is on him to show such matter of defense, and each one having introduced evidence, the judgment of the trial court in allowing him to conclude is within his discretion under the rule, and not reviewable on appeal.

2. **Instructions—Contracts—Defenses—Cancellation—Appeal and Error.**

Where there is conflicting evidence as to whether the contract sued on had been canceled by the parties, and the answer to this issue is controlling, it is not reversible error for the court to omit to state all the contentions of the parties or to charge as to the law on every possible phase of the evidence, undess in apt time so requested to do under the rules: *Held,* in this case a request of plaintiff to answer the issue "No" if the defendant had breached his contract on or before a certain date was properly refused.

STACY, J., took no part in the consideration and decision of this case.

APPEAL by plaintiff from *Kerr, J.,* at May Term, 1921, of NEW HANOVER.

This was an action to recover $3,675 for alleged breach of contract. The execution of the contract was admitted by the defendant, but alleging that it had been mutually canceled and released about 1 June, 1912, in consideration of a cancellation and discharge of an indebtedness of about $800, which was then due by the plaintiff to the defendant. The plaintiff denied there was any mutual cancellation of the contract, and contended that he was wrongfully discharged by the defendant. The case was in this Court on a former appeal, 170 N. C., 302. The jury, in response to the issues, found that the contract described in the complaint had been made, but that the parties to said contract thereafter mutually canceled and annulled the same, and that the plaintiff had sustained no damages. Appeal by plaintiff.

Wright & Stevens for plaintiff.
John D. Bellamy & Sons and C. D. Weeks for defendants.

CLARK, C. J. The plaintiff tendered no issue and made no exceptions to those submitted by the court, which, besides, were those properly arising upon the pleadings. The plaintiff contended, however, that the court erred in giving to the defendant the opening and conclusion of the argument, but the defendant having admitted the first issue as to the execution of the contract described in the pleading, the burden of the second, namely, the allegation of the cancellation of the contract, rested with the defendant and the court allowed the defendant to open and conclude. This was a matter entirely in the discretion of the judge. Rule 6 of the Rules of Practice in the Superior Court, prescribed by this Court, provides, 174 N. C., 848: "In any case where a question shall arise as to whether the counsel for the plaintiff or the defendant shall have the reply and the conclusion of the argument the court shall decide who is so entitled and except in the cases mentioned in Rule 3 (*i. e.,* when no evidence is introduced by the defendant), its decision shall be final and not reviewable."

Besides, the court properly charged that the burden was upon the defendant to establish by the evidence that there had been a mutual cancellation of the contract, and also to show that the plaintiff did or could, by reasonable effort and diligence, have reduced the amount of his loss. The third issue as to the measure of damages was immaterial if no error was committed as relates to the second issue. The rulings of the court as to the admission and rejection of evidence was proper.

The plaintiff abandoned all exceptions for refusal of the judge to charge as prayed except one: "If the defendant had breached the contract on or before 14 June, 1912, you will answer the second issue 'No.'" The court properly refused this prayer, except so far as he instructed the jury in the general charge, an examination of which shows that the law bearing on the evidence and issues was clearly and sufficiently stated.

It is not incumbent upon the court to present every contention of the various parties, nor to charge as to the law in every possible phase of the evidence. If counsel for the plaintiff had desired more specific instructions on any point involved, he should have so requested. The trial was principally, if not entirely, upon the evidence, and the result depended almost entirely upon the second issue as to the cancellation of the contract in regard to which the court charged the jury that the defendant having admitted the execution of the contract and pleaded the mutual cancellation of it, then the burden was upon it to show by the greater weight of the evidence that the contract was actually canceled and annulled, and further charged as to the third issue: "As to how much the contract price has been diminished and how little the plaintiff has been damaged, the burden is upon the defendant company."

Upon full consideration of all the matters presented for our consideration, we find

No error.

STACY, J., took no part in the consideration and decision of this case.

ARMOUR FERTILIZER WORKS v. GEORGE F. SIMPSON.

(Filed 5 April, 1922.)

1. **Contracts—Breach—Fertilizer—Damages—Crops.**

Where the purchaser of fertilizer has suffered damages in the diminution of the value of his crop, caused by the vendor's breach of his contract in making delivery beyond the time specified, and at the time of the sale the vendor's sales agent knew the kind of crop the fertilizer was to be used on and the time of its planting, such damages may be recovered as are reasonable and may fairly be considered, either as arising naturally, according to the course of such matters, from the breach of the contract itself, or such as may reasonably be supposed to have been in the contemplation of the parties at the time of the sale, as the probable result of the breach of its terms; but excluding all speculative and conjectural elements which have no foundation for proof.

2. **Same—Waiver.**

Where damages to crops are recoverable by the purchaser of fertilizer for the breach by the vendor to deliver at the time specified in the contract of sale, the purchaser does not waive his right of recovery by giving his note for the purchase price when the loss was occasioned subsequently and could not then have been ascertained or estimated.

APPEAL by defendant from *Kerr, J.*, at the October Term, 1921, of CUMBERLAND.

Plaintiff sued to recover the amount alleged to be due on a note executed by defendant for fertilizer. Defendant admitted the execution of the note, and pleaded plaintiff's breach of contract in failing promptly to deliver the guano. There was evidence for defendant tending to show that the order was given plaintiff's agent in February; that a contract was made for delivery in March; that plaintiff had delivered other fertilizer in Cumberland County in March upon an order given in February; that plaintiff's shipment was made about the first of May, and received a few days later; and that in consequence of the delay in making the shipment the defendant's crop was damaged to the extent of $700 to $800. The defendant pleaded a counterclaim for such loss. The note was executed after the fertilizer had been accepted by the defendant. At the close of the defendant's evidence the court held that the defendant could not recover on the counterclaim, and rendered judgment in favor of the plaintiff for the amount of the note. Defendant excepted and appealed.

Cook & Cook for plaintiff.
Bullard & Stringfield for defendant.

ADAMS, J. The defendant admitted the execution of the note and introduced several witnesses who testified in his behalf. Their evidence tended to show that the plaintiff's agent was acquainted with the quality of the defendant's soil and informed of the purpose for which the guano was to be used, and that the plaintiff, through inadvertence in misplacing or losing the defendant's order, delayed the shipment from March until May. We think the evidence should have been submitted to the jury. "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive, in respect of such breach of contract, should be such as may fairly and reasonably be considered either arising naturally, that is, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." *Hadley v. Baxendale*, 9 Exch., 353. If the purchaser of guano may show a breach of warranty as to its quality by the effect of its use upon his crops (*Carter v. McGill*, 168 N. C., 507), why may he not by proper evidence show the relative production of land with and without the fertilizer, or the usual effect under ordinary conditions of delayed planting when fertilizer is used? Evidence as to cultivation and tillage, the crop planted, the time of planting, the quality of the soil, and the condition of the weather and the seasons may, under proper instructions, be considered by the jury. *Carter v. McGill, supra; Tomlinson v. Morgan*, 166 N. C., 560; *Herring v. Armwood*, 130 N. C., 177; *Spencer v. Hamilton*, 113 N. C., 49; *Neal v. Hardware Co.*, 122 N. C., 105; *Gatlin v. R. R.*, 179 N. C., 435. In material respects, *Ober v. Katzenstein*, 160 N. C., 440, is distinguishable from the case under consideration; but in that case it is said that when the vendor knows that the fertilizer is for the purchaser's crops, and fails to deliver it, and the purchaser, because of the lateness of the season, is unable to purchase it elsewhere, he is entitled to damages. In the present case there was evidence that the plaintiff's agent repeatedly told the defendant that the shipment would be made.

But in applying the decisions, as suggested in *Carter v. McGill*, 171 N. C., 775, all purely speculative and conjectural elements which have no foundation for proof should be excluded.

We cannot hold as an inference of law that the defendant waived his alleged defense by the execution of the note; for, according to his contention, the loss he claims subsequently to have suffered could not then be ascertained or estimated.

The judgment of his Honor in dismissing the defendant's counterclaim is reversed, and this will be certified to the end that the court may determine the matters in controversy in accordance with law.

Reversed.

J. P. COUNCIL ET AL. v. W. T. SANDERLIN ET AL.

(Filed 5 April, 1922.)

1. **Game—Hunting—Statutes.**

The legislative power to enact game laws upon the principle that game does not become private property until reduced to possession, is binding upon the owners of land and all others, and, subject thereto, such owners have the right to protect the game upon their own lands against trespassers thereon.

2. **Same—Deeds and Conveyances—Reservation of Privilege—Profit a Prendre—Venary.**

By deed, or other proper written conveyance, but not by parol, the owner of lands may convey the hunting privileges thereon under such terms as may be agreed upon, separate from the lands, under the principles applying to a *profit a prendre*, classified by Blackstone under the heading of "Venary," it being an estate in the lands to that extent, and not subject to revocation at the will of the owner.

3. Same—Rights and Remedies.

The remedy of one whose hunting rights over the lands of another are being violated is, in proper instances, by suit for specific performance, by injunction, or by an action for damages.

4. Game—Definition.

The ownership of the right to shoot for sport over the lands of another is not limited to game in a strict sense, but confers the right to shoot such animals as are ordinarily understood to be a subject of such sport.

5. Game—Reservation of Privilege—Deeds and Conveyances—Estates.

The privilege of hunting over the lands of another is such an estate therein as may be assigned by or inherited from the owner, when the grant does not otherwise determine the rights of the parties.

6. Same—Perpetuities.

The right of one to hunt upon the lands of another is a present and not a future interest, to which the rule against perpetuities is inapplicable.

7. Game—Deeds and Conveyances—Reservation of Privileges—Evidence—Letters.

Where the wording of a grant of the right to hunt upon the lands of another is ambiguous, a letter written before the controversy arose, by a grantee of the lands, may be introduced as evidence of weight against the claimant of the right from a later owner of the land to hunt.

8. Game—Deeds and Conveyances—Reservation of Privilege—Leases—Rights of Grantee of Land.

The owner of land conveyed it, reserving for himself, his heirs and assigns, the right to hunt over such portions as may remain uncleared and uncultivated, and to protect the game thereon against trespass of all persons except the grantee, his "executors, administrators and assigns": *Held*, the hunting rights of the grantor over the portion designated did not exclude the right of the grantee and his successors while they owned the lands to hunt thereon themselves, but a lease made by the latter of the hunting privileges was invalid as an invasion of the right which the grantee had reserved.

[Citation by CLARK, C. J., of status of game in North Carolina two centuries ago.]

APPEAL by defendants from *Connor, J.*, at January Term, 1922, of BLADEN.

The plaintiffs conveyed to the Southern Chemical Company, 10 July, 1902, a tract of 1,319 acres on Lake Waccamaw, in Bladen County, in fee simple, with the following reservation: "But the said J. P. Council and J. A. Council reserve for themselves, their heirs and assigns, the right to hunt on any of the above described lands as may remain uncleared and uncultivated, and the power to protect the game on said land against the trespass of all persons except the Southern Chemical Company, their executors, administrators, and assigns."

It is found as a fact by the court that the plaintiffs have never abandoned their rights under the reservation, or exception, above mentioned, but have continuously exercised said rights since the execution of said deed, and that the lands in question are chiefly what is known as savannah lands, and, under present conditions, of little value for anything other than hunting purposes.

On 22 December, 1902, the Southern Chemical Company conveyed to the Southern Products Company the above tract of land with the above clause that the conveyance is subject to the existing rights of J. P. Council and J. A. Council to hunt over the above described lands that may remain uncleared and uncultivated, and with the power to protect game in said land against trespass, as particularly specified in the above deed from Council & Council to said chemical company. On 1 January, 1903, J. A. Pickett, acting under power of attorney from the Southern Products Company, conveyed the said land to the Worth Company by a mortgage to secure a loan. The lands were sold under mortgage to Matt J. Heyer on 3 May, 1905, and soon thereafter said Matt J. Heyer conveyed the land to J. A. Pickett (the present owner thereof), and on 11 November, 1921, Pickett and wife conveyed to the defendant W. T. Sanderlin and H. M. McAllister, by way of lease for five years, the "right of hunting and protecting the game and all wild life on said lands and the right to exclude all persons from entering upon said lands with firearms or dogs or other devices used in the capture of wild life."

The above deeds were all duly probated and recorded. This is a proceeding or restraining order, which was made permanent, to prohibit Sanderlin and McAllister from interfering with the plaintiff's hunting rights on said land. Said defendants allege that the reservation, in the Council deed above, of the hunting privilege is void, and that the plaintiffs are trespassing on the rights of Sanderlin and others, and sought a restraining order against plaintiffs from hunting or trespassing upon said lands. The causes were consolidated, and upon the facts found the restraining order against Council and others was dissolved, and it was made permanent against the defendants, who appealed.

Sinclair, Dye & Clark and R. S. White for appellees.

E. F. McCulloch, Lyon & Johnson, and Johnson & Johnson for appellants.

CLARK, C. J. The plaintiffs conveyed the land in fee simple in 1902, reserving the hunting privileges thereon, and the court finds, in this proceeding, as a fact that the plaintiffs have never abandoned their rights under said reservation, but have continuously exercised same since the execution of the deed of 10 July, 1902, and the court held as a matter of law that the plaintiffs "have the exclusive right to enter upon the uncleared and uncultivated portions of the lands in question, in person, and with invited guests, and have the power to protect the game thereon, except such injury thereto as may be caused by the owner in the use of said land for purposes other than hunting," and made permanent the restraining order in behalf of said Council and others.

The sole point presented, therefore, is as to the validity and construction of such reservation in a conveyance of the realty. In *S. v. Gallop*, 126 N. C., 979, this Court fully discussed the right of hunting, and held that the ownership of game is in the people of the State, and the right to hunt and kill game may be granted, withheld, or restricted by the Legislature, and that game does not become private property until reduced to possession. But it further held that landowners can prevent others from hunting on their land in virtue of their right to keep trespassers off the land or under statutory enactment. *S. v. Gallop, supra*, has been often cited and approved. See citations thereto in 2 Anno. Ed. It is under the authority of this principle that our laws for the preservation of game have been enacted. Under the game laws applicable to that county there are only two months in the year during which game can be hunted. The legislative restriction is valid against the owners of the hunting privilege, and the rest of the world besides. The question here presented is whether the owner of real estate, in conveying the same, can dissever from the title to the land and retain in himself and his heirs and assigns, either solely or jointly with the grantee in the deed, the hunting privilege. The law is summed up with much fullness in the able and interesting brief filed by the plaintiffs' counsel.

Beginning with the earliest English cases, it has been held uniformly that a shooting privilege is a *profit a prendre*, and in *Davies' case*, 3 Mod., 246, it was held that one might acquire a prescriptive right over the lands of another. A right to shoot and take game is a *profit a prendre*, and was held to be an interest in land within the statute of frauds. *Webber v. Lee*, 51 L. J. Q. B., 485. It has also been held in numerous cases in England that the right granted by deed to kill and take game was an incorporeal hereditament, which Blackstone styles the right of venary. 2 Bl. Com., 415. In *Payne v. Sheets*, 75 Vt., 355, it was held that the exclusive right to shoot and fish upon the lands of another when not granted in favor of any dominant tenement, is not an easement, but a *profit a prendre*, and the grantee of such right, though not the owner of the soil, has such interest in land as would entitle him to maintain an action of trespass, under a statute authorizing such an action, in respect of lands by the owner thereof.

In *Shooting Club v. Barber*, 150 Mich., 571, it was held that a right to shoot over the lands of another, acquired in connection with the purchase of a lot carved therefrom, is not a mere revocable license, but an interest which will support an action for specific performance.

There are also numerous cases not necessary to cite that a clause in a lease of land reserving to the lessor the right of "shooting and sport" over land is not limited to game in a strict sense, but confers the right to shoot such animals as are ordinarily understood to be a subject of such sport.

In *Wickham v. Hawker,* 7 Mees. & W., 63, it is held that a grant to one and his heirs and assigns of the liberty to hunt on the grantor's land was a grant and not a mere revocable license. A deed for shooting privileges on land is a grant of a *profit a prendre. Isherwood v. Salene* (Or.), 40 L. R. A. (N. S.), 299, citing numerous cases.

In 12 R. C. L., 689, 690, the law is thus summed up: *"Acquisition of hunting rights in premises of another.* Though one person has no natural right to hunt on the premises of another it is clear that a right to do so may be acquired by a grant from the owner. Or the owner can convey his premises and reserve to himself the hunting and fowling rights thereon. An owner of lands may convey exclusive hunting rights thereon to others so as to bar himself from hunting on his own premises. He may make a lease of the hunting privileges giving the lessees the exclusive right to kill game or water fowl on the premises, and at the same time reserve to himself the pasturage rights on the premises. The right to hunt on another's premises is not a mere license, but is an interest in the real estate in the nature of an incorporeal hereditament, and as such it is within the statute of frauds and requires a writing for its creation. Nor is the right of one person to hunt or fowl on premises owned and in the possession of another an easement, for strictly speaking, an easement implies that the owner thereof shall take no profit from the soil. The right is more properly termed a *profit a prendre.* Unless the grant otherwise determines the rights of the parties, the owner of the hunting privileges may assign his rights to another, but he cannot give a pass or permit to another so as to allow the latter to exercise hunting privileges on the premises." To same purport, 9 R. C. L., 744.

Profit a prendre is created by grant; it cannot be created by parol. If enjoyed by reason of holding certain other estate it is regarded in the light of an easement appurtenant to an estate; whereas, if it belongs to an individual (as in this case), distinct from any ownership of other lands, it takes the character of an estate in the land itself, rather than that of an easement therein. Furthermore, such right may be assignable or inheritable, which is not the case with an easement in gross. Examples of *profit a prendre* are the right to take timber from the land of another, or coal, or to fish in water belonging to another, 9 R. C. L., 744, or to shoot over land or to take game or wild fowl, 14 Cyc., 1143, note 29.

The right of hunting or fowling on another's lands or water may be acquired by grant or lease from the owner, either with or without the soil, and with such restrictions or limitations as the owner may see fit to impose. This right, being a right of profit in the land, passes by grant or lease of the land, unless expressly reserved. *Lee v. Mallard,* 116 Ga., 18; *Beckman v. Kreamer,* 43 Ill., 447; *Matthews v. Treat,* 75 Me., 594.

In *Ingram v. Threadgill,* 14 N. C., 61, it is said: "The Pee Dee River, at the place where the trespass is alleged to have been committed, is not a navigable river, but a private one, and the owners of the land on each side of it have a right to the middle of it. The same may be said of rivers which divide nations. *Handley v. Anthony,* 5 Wheat., 374. Although these franchises of fisheries are not granted by the State as lands are by law granted, yet when the lands adjoining such rivers are granted, the right of fishing vests in such grantees, and gives them the right of fishing to the middle of the stream in the water opposite their land, but not the right of fishing in water above or below the banks which belong to them."

This case is cited in *S. v. Glen,* 52 N. C., 326, where it is said: "As the riparian proprietor of the land on both sides of the stream, he is clearly entitled to the soil entirely across the river, subject to an easement in the public for the purpose of transportation of lime, flour, and other articles in flats and canoes. He is also, as such proprietor, entitled to the exclusive right of fishing entirely across the stream." This was said as to the Yadkin River, where it was nonnavigable.

The rule against perpetuities has no application to such interests over the lands of others because they are present and not future interests. Gray, Perpetuities, sec. 279.

Not only is an injunction, as well as an action for damages, a proper remedy for the protection of an exclusive hunting privilege, but if a member of the public is denied his common right to hunt on public waters, the interference with this right may be enjoined. 9 R. C. L., 691, and cases there cited.

In this record there is in evidence a letter from J. A. Pickett, one of the *mesne* grantees of the premises and lessor of defendants, written in 1903, to the plaintiff in which he stated: "I have given no one the right to hunt on your preserves, nor have I myself fired a gun on the property and would not have gone on the premises or gone with any of my neighbors to hunt thereon without your (plaintiff's) permission except as to the little plots of peas and buckwheat"; as Council's reservation of the shooting privilege did not include the cleared or cultivated portions and that he had "always recognized Council's right." This, however, has no legal effect, except as a recognition of the meaning and intent of the reservation, if the same had been ambiguous, upon the familiar principle that when a contract is ambiguous in its terms, a construction given to it by the parties thereto, and by their actions in regard thereto, before any controversy has arisen as to its meaning, made with knowledge of its terms, is entitled to great weight, and will, when reasonable, be adopted and enforced by the court.

The words of the conveyance to be construed are as follows (after granting the premises in fee to the Southern Chemical Company): "But the said J. P. Council and J. A. Council reserve for themselves, their heirs and assigns, the right to hunt on any of the above described lands as may remain uncleared and uncultivated, and the power to protect the game on said land against the trespass of all persons except the Southern Chemical Company, their executors, administrators, and assigns."

We understand the meaning of this conveyance to be a reservation of the right of hunting, the *profits a prendre* to the grantors in fee simple as to such part of the premises as remain "uncleared and uncultivated," and so long as they so remain, with power given the grantors to protect the game thereon against being hunted by any persons except the Southern Chemical Company, their executors, administrators, and assigns.

The decree entered by the court in this case provides that the plaintiffs "have the exclusive right to enter upon the uncleared and uncultivated portions of the lands in question, in person and with invited guests, and have the power to protect the game thereon, except such injury thereto as may be caused by the owner in the use of said land for purposes other than hunting." We think that the above decree is a proper construction of the reservation, except in the use of the word "exclusive," and that a proper construction of the deed, including the reservation, is that the grantees also had the right to hunt upon the premises, and so have their successors, as owners of the land; that is, that the grantors have a fee-simple right of hunting, and that their grantees have the same right so long as they are owners of the premises. As such, they have a base and qualified right in the hunting privilege, but without the right to extend such privilege to others. The grantees of the land and their assigns of the lands have the right to hunt on the premises themselves, while owners thereof, jointly with the fee-simple privilege of hunting reserved by the reservation to the grantors. The use of the words giving the grantors the right to protect the game on said land against trespass of "all persons except the Southern Chemical Company, their executors, administrators and assigns," must necessarily be limited to the grantees of the land and the assignees of the ownership thereof.

If not so limited, it would clearly be destructive of the reservation to the grantors of protection of the game. This is evidenced by the attempted lease for five years by the present owners of the land to the defendants, Sanderlin and McAllister, of the "right of hunting and protecting the game and all wild life on said lands, and the right to exclude all persons from entering upon said lands with firearms or dogs, or other devices used in the capture of wild life." This attempted lease is invalid, for it is not connected with the ownership of the land, and under it the grantees attempted even to exclude the plaintiffs, who unquestionably have the hunting privilege in fee simple.

The court properly granted an absolute injunction against the defendants Sanderlin and McAllister, and sustained the validity of the claim of the plaintiffs as against them. We think, however, that the owners of the land have the right to hunt over the same themselves, but without power of leasing said privilege or granting it to others, 12 R. C. L., 890; *Bingham v. Salene,* 15 Or., 208; 3 A. S. R., 152. The word "exclusive," therefore, should be stricken out of the decree, which, as thus modified, will be affirmed.

We have quoted largely in this opinion from the learned and well considered brief of the plaintiff, and as a matter of more than usual interest to the public and the profession, we insert here from that brief the following incident which occurred very near to, if not upon these very premises, on the banks of Lake Waccamaw, 188 years ago, as follows:

"On 18 July, 1734, a traveler, lured by the glowing descriptions that he had heard of Waccamaw Lake, set out from a point on the Cape Fear River to visit that spot. In making the journey he passed quite near to, if not through, the hunting preserve of the plaintiff. This soldier of fortune, writing of the trip, says in part: 'We came to a large cane swamp, about half a mile through, which we crossed in about an hour's time, but I was astonished to see the innumerable sights of mosquitoes, and the largest that I ever saw in my life, for they made nothing to fetch blood of us through our buckskin gloves, coats, and jackets. As soon as we got through that swamp we came to another open pine barren, where we saw a great herd of deer, the largest and fattest I ever saw in those parts; we made shift to kill a brace of them, which we made a hearty dinner on. We rode about two miles farther, when we came to another cane swamp, where we shot a large she-bear and two cubs. The swamp was so large that it was with great difficulty we got through it. When we got to the other side, it began to rain very hard, or otherwise, as far as I know, we might have shot ten brace of deer, for they were almost as thick as in the parks in England, and did not seem to be in the least afraid of us, for I question much whether they had ever seen a man in their lives before, for they seemed to look on us as amazed. We made shift as well as we could to reach the lake the same night, but had but little pleasure; it continued to rain very hard, we made a large fire of lightwood, and slept as well as we could that night. The next morning we took a particular view of it, and I think it is the pleasantest place that I ever saw in my life. It is at least eighteen miles around, surrounded with exceedingly good land, as oak of all sorts, hickory, and fine cypress swamps. There is an old Indian field to be seen, which shows it was formerly inhabited by them, but I believe, not within these fifty years, for there is scarce one of the Cape Fear Indians, or the Waccamaws, that can give any account of it. There is plenty of deer, wild turkey, geese, and ducks, and fish in abundance; we shot sufficient for forty men though there were but six of us.' " Sprunt's "Chronicles of the Cape Fear," 46 (2 ed.).

To which the brief appropriately adds: "All must agree that these worthy gentlemen, near two hundred years ago, upon the very game preserve, the right to a part of which is involved in this appeal, set a bad example by shooting enough game for forty men when only six could benefit thereby. Sad to record, this bad example has been so universally followed that the once magnificent American game, like its *quondam* denizens of the pristine forests, the American Indian, has become almost extinct. The look of amazement detected by the stranger in 1734, in the appealing eyes of the beautiful deer of the Waccamaw section as they looked, perhaps for the first time, upon man, has given place to a glint of horror and despair as the few survivors rush headlong for the haven of rest maintained by the plaintiff. They have learned to know that there they may rest in peace save for two months in each year, and that even during this time they will occasion far more fright to the inexperienced hunters to whom they so suddenly appear than they need entertain for themselves.

"The plaintiff, big of body, of mind, and of heart, living by the side of the beautiful Waccamaw, is no more a lover of the hunt than of the hunted. Nature speaks strongly to him, and he is a lover of all wild life. Always has he labored for the enactment and enforcement of wise and beneficent laws intended to prevent the complete extermination of the game which once so richly abounded in his section. Doubtless there is more game on the preserve maintained by him, and for miles around it, than in any other part of the State; yet, had it not been for his persistent efforts, the hide and horns of a deer would be today an object of great curiosity in all that section. So that not only by the law of the case is his position sustained, but by a wise policy as well."

Modified and affirmed.

HARMON PATE v. R. T. GAITLEY ET AL.

(Filed 5 April, 1922.)

1. **Deeds and Conveyances—Consideration—Parol Evidence—Statute of Frauds.**

   Parol evidence to show the actual consideration in a deed to lands, executed and delivered, different from that therein expressed is neither at variance with the rule against changing or adding to the terms of a written instrument, nor within the prohibition of the statute of frauds, but is of an independent contract outside of the covenants appearing in the deed, and the vendor may prove by parol the amount thereof, the terms of payment and its nonpayment.

2. **Same—Rental—Actions—Damages.**

   During the continuance of the lease of a large tract of land for the agreed annual payment of fifteen bales of cotton as rent, the lessee obtained an option of purchase at the price of $15,000, which he exercised in September of that year, receiving from the lessor and the owner a warranty deed of the *locus in quo* with full covenants: *Held*, parol evidence was competent to show that the agreed rental was reserved from the purchase price of the land, expressed in the deed, in the vendor's action to recover the rent cotton or its value.

APPEAL by defendants from *Kerr, J.*, at December Term, 1921, of ROBESON.

Civil action to recover fifteen bales of cotton, or the value thereof, as rent for a 200-acre farm for the year 1919, which subsequently, by agreement, entered into and became a part of the purchase price of the land—the defendant R. T. Gaitley having bought the farm during his tenancy.

From a verdict and judgment in favor of plaintiff, the defendants appealed.

Johnson & Johnson and McLean, Varser, McLean & Stacy for plaintiff.

McIntyre, Lawrence & Proctor for defendants.

STACY, J. The defendants leased from the plaintiff a valuable farm, located in Robeson County, and containing about 200 acres, for the years 1918 and 1919; and, as rent for said farm, it was stipulated and agreed in a written contract between the parties that the defendants should deliver to the plaintiff, "at Parkton, N. C., on or before 15 October of each year, during the life of said lease, fifteen bales of middling lint cotton, averaging 500 pounds to the bale." Later, and during the continuance of said lease, the defendant R. T. Gaitley took a written option from the plaintiff, whereby he acquired the right to purchase the farm in question at and for the price of $15,000. This option was exercised on or about 10 September, 1919, at which time the plaintiff executed and delivered to the said defendant a warranty deed, with full covenants, conveying to him the *locus in quo,* same being the originally demised premises.

At the time of the execution of the option, and again upon the signing and delivery of the deed, conveying the property in question to the defendant, it was specifically agreed and understood between the parties that the rent, as previously stipulated, for the year 1919 should be reserved and paid to the plaintiff by the defendants in accordance with the terms of the rental contract. The jury have found that this understanding and agreement existed not only before the execution of the said option and deed, but that the same, as alleged in the complaint, was "specifically reiterated, repeated, and agreed to at the time of the execution of the said option and execution and delivery of said deed, all of which was fully assented to and agreed to by the defendant R. T. Gaitley, and he did then and there repeat his promise to pay said rent for the year 1919, in accordance with the said written lease."

But the said defendant R. T. Gaitley now contends that as he held a deed for the land and was the owner thereof at the time the 1919 rent fell due, he is no longer liable to the plaintiff therefor, but that said rent passed to him under his deed, as owner of the property. For this position he relies upon the following decisions: *Mixon v. Coffield,* 24 N. C., 301; *Lewis v. Wilkins,* 62 N. C., 307; *Kornegay v. Oliver,* 65 N. C., 69; *Rogers v. McKenzie,* 65 N. C., 218; *Lancashire v. Mason,* 75 N. C., 459; *Holly v. Holly,* 94 N. C., 674.

We do not think this position can avail the defendant in the face of the jury's finding that he had agreed otherwise, and that such constituted a part of the consideration given for his option and deed. It is well settled that a vendor, in a suit for the purchase price of land, may prove by parol the amount thereof, the terms of payment and its nonpayment, notwithstanding the deed may contain a recital or acknowledgment contrary to the real transaction between the parties. *Faust v. Faust,* 144 N. C., 383; *Grabow v. McCracken,* 23 Okla., 613; 23 L. R. A. (N. S.), 1218, and note. Such recital is only *prima facie* evidence of the payment of the purchase price, and may be rebutted by parol testimony. *Barbee v. Barbee,* 108 N. C., 581.

In *Michael v. Foil,* 100 N. C., 179, the deed recited a consideration of $500, but the court admitted parol evidence to show that at the time of the conveyance the grantee agreed with the grantor that he should have one-half of the proceeds of the sale of the mineral interest in the land, if such sale were made during his lifetime, and that such entered into and became a part of the consideration and inducement for the transaction. To like effect is *Manning v. Jones,* 44 N. C., 368.

The admission of this character of evidence is not at variance with the rule against changing or adding to the terms of a written instrument by parol, nor is it prohibited by the statute of frauds. *Harper v. Harper,* 92 N. C., 300. The deed is not in controversy. It was executed by the plaintiff in performance of his part of the contract for the sale of the land, and it is but meet that the defendant should likewise comply with his agreement in regard to the amount that should be paid. The statute of frauds was not intended to shelter or to shield frauds, but to prevent them. 39 Cyc., 171; *McNinch v. Trust Co., ante,* 33, and cases there cited.

In the instant case, the sale of the land is an accomplished fact; the deed has been executed and delivered; title has passed, but this *ipso facto* did not have the effect of relieving the defendant from his obligation to pay what he had agreed to pay. The contract in regard to the rent added no new covenant to the deed, nor did it contradict or explain any one that was incorporated in it. On the other hand, the plaintiff specifically affirms the deed and is now seeking to recover the full purchase price of the land. The suit is based upon an independent contract outside of, but in nowise in conflict with, the covenants appearing in the deed. "The recital of the amount of the consideration, or of its receipt, can be contradicted in an action to recover the purchase money, but that is because this is no part of the conveyance." *Campbell v. Sigmon,* 170 N. C., 351.

As the rent cotton was evidently intended to be paid out of the crops grown upon the farm in question, it would seem that the reservation might be justified, also, under the doctrine announced in *Flynt v. Conrad,* 61 N. C., 191, and other cases to like import; but, as the fact does not affirmatively appear—the written lease not being set out in the record—we deem it unnecessary to discuss this suggested phase of the case.

We have found no error in the trial, and the judgment of the Superior Court will be upheld.

No error.

W. J. BRADSHAW & COMPANY v. BOSTON AND MAINE RAILROAD COMPANY ET AL.

(Filed 5 April, 1922.)

Carriers of Freight—Connecting Lines—Negligence—Damages—Actions—Claim and Delivery—Attachment—Tender of Charges—Appeal and Error.

The consignee of an interstate carrier of goods, in his action for damages thereto against the delivering carrier, sued out an attachment, and this carrier replevied, C. S., 830, 836; and thereafter the plaintiff sued out a writ of attachment in his action against the foreign, initial carrier, and the delivering carrier, and it appears that upon the trial both actions and the proceedings thereunder were consolidated and dismissed for the failure of the plaintiff to plead or prove a tender of payment of freight, war tax, and demurrage: *Held*, the plaintiff not having abandoned the shipment, and not suing for its full value, but for damages alleged to have been caused by the carrier's negligence, should have been permitted to proceed on his claim therefor, though not entitled to the immediate possession of the shipment. *Lumber Co. v. R. R.*, 179 N. C., 359; *Whittington v. R. R.*, 172 N. C., 501, cited and applied.

APPEAL by plaintiff from *Connor, J.*, at September Term, 1921, of NEW HANOVER.

Civil action to recover damages for an alleged negligent delay and injury to a carload of furniture while in the possession of the defendants for transportation.

From a judgment on the pleadings, denying plaintiff the right to recover, it prosecutes this appeal.

J. Felton Head for plaintiff.
John D. Bellamy & Sons for defendants.

STACY, J. The record in this case is not altogether clear; it is somewhat complicated and confused; but, as we understand it, on or about 31 March, 1920, a carload of furniture was shipped from Joslin, N. H., to the plaintiff at Wilmington, N. C., over the lines of the Boston & Maine Railroad Company, as the initial or receiving carrier, and other connecting carriers, and finally over the road of the Seaboard Air Line Railway Company as the terminal or delivering carrier. This shipment was delayed in transit for a period of more than four months, and plaintiff alleges that same was greatly damaged by reason of the "defendants' negligent transportation and other wrongful acts in handling said shipment."

Upon the arrival of said goods in Wilmington, the plaintiff failed and refused to pay the freight, war tax, and demurrage, which the defendants charged for carrying and transporting said goods, "except on condition the defendants allow a credit of same as a part payment of plaintiff's claim" for damages alleged to have been sustained by reason of negligent delay in transportation, etc. The terminal carrier declined to deliver the goods or to surrender their possession, under the terms as stated; whereupon the plaintiff sought to obtain possession of said furniture by claim and delivery proceedings. C. S., 830 *et seq.; Walter v. Earnhardt,* 171 N. C., 731. In this action the defendant, Seaboard Air Line Railway Company, executed a replevin bond and retained possession of the goods as allowed by law. C. S., 836. It does not appear that any pleadings were ever filed in this case.

The plaintiff then sued out a writ of attachment, in an action for damages, against the Boston & Maine Railroad Company and joined the Seaboard Air Line Railway Company as a party defendant. Thereafter, at the regular September Term, 1921, of the Superior Court of New Hanover County, as appears from the record, the following proceedings were had, to wit:

"Upon the calling of both the claim and delivery suit and the attachment suit, for trial, the defendants, through their counsel, stated to the court that no jury would be necessary, because counsel for plaintiff would admit that the pleadings did not allege plaintiff had tendered the bill of lading and transportation charges on said shipment. . . .

"Upon reading the pleadings, the court inquired of counsel for plaintiff if he admitted that plaintiff had not tendered the freight and other charges for transportation, as set out in said pleadings, and upon counsel answering that he did accordingly admit, the court decided that the plaintiff could not recover, and gave judgment for the defendants as set out in the record."

The concluding paragraph of said judgment is as follows: "It is ordered and adjudged that plaintiff take nothing by this action, that defendants go without day and recover of the plaintiff their costs, and that the ancillary proceeding in this cause be and the same is hereby dismissed."

From the foregoing it would seem that the two suits were consolidated and considered as one. This was so stated on the argument before us, and there is only one judgment appearing on the record.

Conceding that under authority of *Lumber Co. v. R. R.*, 179 N. C., 359, plaintiff was not entitled to the immediate possession of the shipment, without first having tendered the freight, war tax, and demurrage charges, yet we see no valid reason why it should not be permitted to proceed on its claim for damages, under the doctrine announced in *Whittington v. R. R.,* 172 N. C., 501, and cases there cited.

It will be observed that plaintiff has not abandoned the shipment and brought suit for its full value; but its second action was to recover damages for delay in transit and alleged negligent injury to the goods. *Parsons v. Express Co.,* 25 L. R. A. (N. S.), 843, and note.

The cause will be remanded for further proceedings; and, as the record is somewhat ambiguous, it would seem that an amendment to the pleadings would not be amiss.

New trial.

JOE WILLIS AND MARY REGAN v. MUTUAL LOAN AND TRUST COMPANY.

(Filed 5 April, 1922.)

1. **Estates—Determinable Fee—Rule in Shelley's Case—Deeds and Conveyances.**

In construing a deed, a distinction should be observed between a determinable fee and an estate created under the rule in *Shelley's case*, and this rule has no application where there is no limitation in the deed by way of remainder, as where an estate is granted to M., and her bodily heirs.

2. **Deeds and Conveyances—Intent—Formal Parts.**

The intention of the parties is now regarded as the chief essential in the construction of conveyances, the object sought being substance, not form, giving effect to every part of the deed, no clause being construed as meaningless if reasonable intendment can be found therefor, and the intention thus ascertained will prevail over the old rule dividing the deed into its formal parts and disregarding contradictions in the *habendum* of the quality or quantity of the estate granted in the premises.

3. **Estates—Determinable Fee—Contingent Remainders—Deeds and Conveyances.**

Where an estate is granted to M., and the heirs of her body in the premises, with warranty to her and the heirs of her body: *Held*, the intent of the grantor by proper construction was to limit over the estate to M. in case she should die without issue or bodily heirs.

4. **Same—Shifting Uses—Statutes.**

An estate to M. and her bodily heirs is converted into a fee simple under our statute, C. S., 1734, without further limitation, but followed by the words "if no heirs, said lands shall go back to my estate," the estate will go over to the heirs of the grantor at the death of M., upon the nonhappening of the event as a shifting use under the statute of uses, 27 Henry VIII., ch. 10; C. S., 1740, whereunder a fee may be limited after a fee, by deed, and under the provisions of C. S., 1737, that every contingent limitation in a deed or will made to depend upon the dying of any person without heir or heirs of the body, or issue, shall be held to be a limitation to take effect when such person dies not having such heir, or issue, or child living at the time of his death.

APPEAL by defendant from *Connor, J.*, at February Term, 1922, of ROBESON.

Controversy submitted without action on case agreed. Judgment for plaintiffs; defendant appealed.

J. S. J. Regan, unmarried and seized in fee, executed to his grantee a deed, the material parts of which are as follows: "This deed, made this 31 January, 1882, by Joseph Samuel Jenkins Regan, of Robeson County, State of North Carolina, to his daughter, Mary Regan, and her bodily heirs, of Robeson County and State of North Carolina.

"Witnesseth, that said Joseph S. J. Regan, for and in consideration of the sum of $1,000, doth bargain, sell, and convey to said Mary Regan and her bodily heirs a tract or parcel of land in Robeson County.

"To have and to hold the aforesaid tract or parcel of land and all privileges and appurtenances thereto belonging, to the said Mary Regan and her bodily heirs, and to their only use and behoof forever.

"And the said J. S. J. Regan covenants that he is seized of said premises in fee and hath right to convey the same in fee simple; that the same are free from all encumbrances, and that he will warrant and defend the said title to the same against the claims of all persons whatsoever, to his daughter, Mary Regan, and the heirs of her body, and if no heirs, said lands shall go back to my estate."

On 1 October, 1914, Mary Regan conveyed said land to Joe Willis, reserving a life estate; and on 3 December, 1921, these two entered into a written agreement to convey to the defendant fifty acres of the land at the price of $3,400. Accordingly they tendered to the defendant a deed in fee, duly executed, and demanded payment of the purchase price, and the defendant refused to make payment or to accept the deed on the ground that they cannot convey a title in fee simple. Mary Regan is now more than seventy years of age and has never been married. His Honor rendered judgment for the plaintiffs. The defendant excepted and appealed. The only question is whether Joe Willis and Mary Regan can convey a title in fee.

McNeill & Hackett for plaintiffs.
Johnson & Johnson for defendant.

ADAMS, J. The plaintiffs contend that the deed should be considered with regard to its formal division into parts, that the last clause, because repugnant to the estate conveyed in the premises, is void, and in consequence that the grantor conveyed to Mary Regan an estate in fee. They rely in part upon the common-law principle that a fee acquired in the premises cannot be divested by the *habendum*. Blackstone says: "The office of the *habendum* is properly to determine what estate or interest is granted by the deed; though this may be performed, and sometimes is performed, in the premises. In which case the *habendum* may lessen, enlarge, explain, or qualify, but not totally contradict or be repugnant to the estate granted in the premises. As if a grant be 'to A. and the heirs of his body,' in the premises, *habendum* 'to him and his heirs forever,' or *vice versa;* here A. has an estate tail, and a fee simple expectant thereon. But had it been in the premises "to him and his heirs," *habendum* "to him for life," the *habendum* would be utterly void; for an estate of inheritance is vested in him before the *habendum* comes, and shall not afterwards be taken away or divested by it." 2 Bl. Com., 298. And Coke: "The *habendum* hath also two parts, viz., first, to name againe the feofee; and, secondly, to limit the certaintie of the estate." 1 Coke, ch. 1, sec. 1, 6a. Originally used to determine the interest granted, or to lessen, enlarge, explain, or qualify the premises, the *habendum* was held to be void if repugnant to the estate vested by preceding parts of the deed. *Hafner v. Irwin,* 20 N. C., 570; *Triplett v. Williams,* 149 N. C., 394. Whether this principle applied to a limitation in the warranty we need not now consider; for neither in the warranty nor in the *habendum* of this deed is there a fatal repugnancy; and the question presented must be resolved by other recognized rules of interpretation.

The plaintiffs can derive no aid from *Shelley's case.* There being no limitation by way of remainder to the heirs or "bodily heirs" of Mary Regan as *nomen collectivum* the deed in question cannot be construed as an unconditional fee. The distinction between a determinable fee and an estate created under the rule in *Shelley's case* is clearly drawn in numerous decisions. *Ward v. Jones,* 40 N. C., 404; *Whitesides v. Cooper,* 115 N. C., 570; *May v. Lewis,* 132 N. C., 115; *Smith v. Proctor,* 139 N. C., 314; *Puckett v. Morgan,* 158 N. C., 344; *Jones v. Whichard,* 163 N. C., 241; *Reid v. Neal,* 182 N. C., 192.

The rigid technicalities of the common law have gradually yielded to the demand for a more rational mode of expounding deeds. Hence, to discover the intention of the parties is now regarded as the chief essential in the construction of conveyances. The intention must be gathered from the whole instrument in conformity with established principles, and the division of the deed into formal parts is not permitted to prevail against such intention; for substance, not form, is the object sought. If possible, effect must be given to every part of a deed, and no clause, if reasonable intendment can be found, shall be construed as meaningless. *Springs v. Hopkins,* 171 N. C., 486; *Jones v. Sandlin,* 160 N. C., 155; *Eason v. Eason,* 159 N. C., 540; *Acker v. Pridgen,* 158 N. C., 337; *Real Estate Co. v. Bland,* 152 N. C., 231; *Featherston v. Merrimon,* 148 N. C., 199; *Gudger v. White,* 141 N. C., 513.

The phrase "to Mary Regan and her bodily heirs"— twice used in the premises and once in the *habendum,* is followed in the warranty by the words to "Mary Regan and the heirs of her body." What was the intention of the grantor? Obviously to limit over the grantee's estate in case she should die without issue or bodily heirs. To give to the deed such construction is not inconsistent with familiar principles of law.

"A conditional fee, at the common law, was a fee restrained to some particular heirs, exclusive of others, . . . as the heirs of a man's body. . . . Now, with regard to the condition annexed to these fees by the common law, our ancestors held that such a gift (to a man and the heirs of his body) was a gift upon condition that it should revert to the donor if the donee had no heirs of his body; but, if he had, it should then remain to the donee. They therefore called it a fee simple, on condition that he had issue." 2 Bl. Com., 110. "Which condition was implied in the words as well as in the intent, for in that the gift is to one and to the heirs of his body, and no further, therein it is implied that if he have no heirs of his body, the donor shall have the land again." *Williom v. Berkley,* Plowd., 223. But upon the birth of issue the donee had power to alien the fee and thereby to bar not only the succession of his issue, but the reversion of the donor in case his issue subsequently failed. *Williom v. Berkley, supra;* 2 Bl. Com., 110. To suppress the exercise of this power the nobility procured the enactment of the statute *de donis conditionalibus* (13 Ed., 1), which so operated that the estate was no longer alienable by the donee upon the birth of issue, but remained to the heirs of his body, and on the failure of such heirs, reverted to the donor. The estate was divided into two parts, leaving in the donee a fee tail, and investing in the donor the ultimate fee simple, expectant on the failure of issue. Estates in fee simple conditional were thus converted into estates in fee tail; "and hence it is that Littleton tells us that tenant in fee tail is by virtue of the statute of Westminster the second." 2 Bl. Com., *supra.* But since the act of 1784 every person seized of an estate in tail shall be deemed to be seized of the same in fee simple. C. S., 1734; *Marsh v. Griffin,* 136 N. C., 333. Eliminating the last clause, the deed therefore conveys to Mary Regan an estate in fee. What, then, is the legal effect of the words "if no heirs said lands shall go back to my estate"?

At common law, because a freehold could not pass without livery of seizin, a fee could not be limited after a fee; but after the statute of uses was enacted (27 Henry VIII., ch. 10; C. S., 1740), the judges departing from the rigor of the common law ingeniously devised the doctrine of springing and shifting uses, under the latter of which a fee may be limited after a fee by deed or will. If by deed, it is a conditional limitation; if by will, it is an executory devise. 2 Bl. Com., 234; *Smith v. Brisson,* 90 N. C., 284.

The scope of the contingent limitation set forth in the last clause of the deed is defined by statute. Every contingent limitation in a deed or will made to depend upon the dying of any person without heirs, or heirs of the body, or issue shall be held to be a limitation to take effect when such person dies not having such heir, or issue, or child living at the time of his death. C. S., 1737; act of 1827, 1856.

Applying these principles, we conclude that the deed should be construed as if it read "to Mary Regan and the heirs of her body (a fee simple, C. S., 1734), and if she should die not having such heirs or issue living at the time of her death, then to the heirs of the grantor." C. S., 1737; *Patterson v. McCormick,* 177 N. C., 448; *Williams v. Blizzard,* 176 N. C., 146; *Reid v. Neal,* 182 N. C., 199. A similar construction may be found in *Smith v. Brisson, supra; Buchanan v. Buchanan,* 99 N. C., 308; *Dawson v. Ennett,* 151 N. C., 544; *Smith v. Lumber Co.,* 155 N. C., 390; *Rees v. Williams,* 165 N. C., 201; *Jarman v. Day,* 179 N. C., 318. There are cases apparently to the contrary, but they were decided before the act of 1827, C. S., 1737. *Davidson v. Davidson,* 8 N. C., 163; *Sanders v. Hyatt, ibid.,* 247; *Hollowell v. Kornegay,* 29 N. C., 261; *Weatherly v. Armfield,* 30 N. C., 26; *Folk v. Whitley, ibid.,* 133. *Ex parte McBee,* 63 N. C., 332, may be considered an exception, but there the act of 1827 was evidently disregarded or overlooked. *Smith v. Brisson, supra.*

From these principles it follows that Mary Regan acquired, under the deed of her grantor, a fee simple, determinable upon her dying without having heirs of her body or issue living at the time of her death, and that she and her coplaintiff cannot convey to the defendant an indefeasible estate in fee. The judgment is therefore

Reversed.

J. J. AYCOCK v. J. E. GILL.

(Filed 5 April, 1922.)

1. **Criminal Actions—Contracts—Illegal Consideration—Stifle Prosecution—Bills and Notes.**

All contracts made with the prosecutor in a criminal action founded upon agreements to compound felonies or stifle prosecutions of any kind are contrary to public policy or the laws of the State, and are unenforceable whether obtained by duress or otherwise.

2. **Same—Compounding a Felony—Less Offense.**

While the compounding or condoning of offenses less than a felony is not indictable, a consideration given for services to be rendered which tend to obstruct the course of justice is contrary to the administration of the law, which the courts will regard as illegal, and will not enforce.

3. **Same—False Pretense.**

Where the prosecutor, in a criminal action for a false pretense, has agreed with the uncle of the defendant that upon the consideration of a note given by the uncle and the defendant for the amount of the loss, the prosecutor would state to the court that his matter with the defendant had been settled, and that he would request the court to be as lenient as possible with the defendant: *Held*, the consideration for the note was illegal, having the tendency to diminish the interest of the prosecutor, or totally withdraw it from the further prosecution of the defendant, contrary to the prosecutor's duty in the vindication of public justice.

Appeal by defendant from *Daniels, J.*, at the October Special Term, 1921, of Wayne.

This action was brought for the cancellation of a promissory note for $400, made by the plaintiff to the defendant, upon the ground of duress, and because it was given upon a promise to suppress a criminal prosecution, or to mitigate the punishment of the plaintiff's nephew for the crime of false pretense.

The court gave judgment for the plaintiff, upon admissions in the answer, holding that the note was not enforceable, but was "invalid, null, and void," as against public policy, and ordered that it be delivered up by the defendant to be canceled.

Plaintiff's nephew, J. D. Hinnant, had been arrested under a warrant of a justice of the peace, issued at the request of the defendant, for false pretense. The answer admitted that at the request of the deputy sheriff and Hinnant, J. E. Gill drove Hinnant and deputy sheriff and police officer from Zebulon, N. C., to Fremont, N. C., in order that Hinnant might arrange for his bond and not be committed to jail, Gill stating to Hinnant and the deputy sheriff that he would charge the sum of $20 for the round trip; that arriving at Fremont, Hinnant talked to his uncle, the plaintiff, J. J. Aycock, and to another uncle named Aycock, whose initials this defendant does not now recall; that J. J. Aycock informed the sheriff and the defendant Gill that he had raised J. D. Hinnant and was very much concerned about him; that the plaintiff J. J. Aycock asked the defendant Gill would he release his nephew, Hinnant, if he (the said Aycock) would sign a note guaranteeing the payment of the debt that Hinnant owed the defendant Gill, which then amounted, including the expense of the automobile trip, to $398.95; that the defendant Gill informed the plaintiff Aycock that he could not agree to discharge his nephew, Hinnant, but that if the plaintiff Aycock desired to guarantee the payment of the debt, that he, the said Gill, would state to the court that the same had been settled, and would request the court to be as lenient as possible with said Hinnant; that after some discussion the plaintiff Aycock signed a note, together with said Hinnant, payable to the order of the defendant J. E. Gill, on 1 December, 1920, for $398.95, with interest from its date, 27 July, 1920.

The defendant appealed from the judgment.

Langston, Allen & Taylor for plaintiff.

J. Faison Thomson and W. G. Massey for defendant.

WALKER, J. The defendant, it is true, denied that there was any duress employed in obtaining the note in question, or that the consideration of it was against public policy, and also denied that he had done anything to stifle a criminal prosecution, and in support of this general denial, he stated what was done, which is above set forth. It will not be necessary to inquire if there was any legal duress exercised by the defendant to procure the note, as if the note is void, because the consideration of it is illegal, being against public policy, it is not enforceable whether obtained by duress or not.

The cases in this Court have settled the general principle involved in this case. *Blythe v. Lovinggood,* 24 N. C., 20; *Garner v. Qualls,* 49 N. C., 223; *Vanover v. Thompson,* 49 N. C., 485; *Lindsey v. Smith,* 78 N. C., 328; *Corbett v. Clute,* 137 N. C., 546. In *Thompson v. Whitman,* 49 N. C., 48, it is decided that the concealment of a felony is an indictable offense, and that the offense is greatly aggravated by compounding the felony, that is, "by an agreement not to prosecute or make known what has come to the knowledge of the party." In offenses less than felony, this compounding or concealment is not indictable, but it is nevertheless against the policy of the law and the due course of justice, and a court of law will not lend its aid to enforce any such contract or agreement. In *Garner v. Qualls,* 49 N. C., 223, the same doctrine is held, the Court declaring that no executory contract, the consideration of which is *contra bonos mores,* or against the public policy, or the laws of the State, can be enforced in a court of justice. The consideration there was the compounding or suppressing, a prosecution for an alleged forgery. The bond was declared void, although the act may never have been, in the view of the law, a forgery. In *Ingram v. Ingram,* 49 N. C., 188, the Court declared that an agreement among persons interested in an estate, not to bid against each other at the administrator's sale, is void, as being against the public policy. It may be now, therefore, pronounced a settled principle "that all contracts founded upon agreements to compound felonies, or to stifle prosecutions of any kind," are void, and cannot be enforced. The Court said, by *Pearson, J.,* in *Thompson v. Whitman, supra:* "His Honor was of opinion that the consideration of the bond sued on was not against public justice. In this there is error. According to the view we take of the case, Taylor was not at liberty to take care of his private interest by accepting an indemnity, and thereby depriving the State of an active prosecutor; which is one of the means relied on for the conviction of offenders. The testimony of Taylor, when contrasted with that of Martin before the committing magistrates, in reference to the same transaction, suggests the fear that this *douceur* had taken effect. When the person directly interested is appeased before the trial, he is under strong temptation to favor the offender." There are many cases decided by this Court to like effect as those already cited, which it is not necessary to consider, as they all settle the principle above stated in the same way.

The defendant contends that his admissions do not bring this case within the principle above stated, as he did not agree to stifle a criminal prosecution or to do anything contrary to the public policy, but only agreed, as the consideration for the note given by the plaintiff to him, that he would intercede with the court in behalf of the plaintiff's nephew and induce it to be lenient with him. But we are of opinion that even that consideration was illegal, and rendered the note void. It has been held that agreements to use influence, or tending to encourage the use of influence, with the prosecuting attorney in respect to criminal prosecutions is illegal. 9 Cyc., 502, and note 33, where the cases will be found. *Merwin v. Huntington,* 2 Conn., 209; *Rhodes v. Neal,* 64 Ga., 704; *Shaw v. Reed,* 30 Me., 105; *Wildey v. Collier,* 7 Md., 273; *Ormerod v. Dearman,* 100 Pa. St., 561; *Barron v. Tucker,* 53 Vt., 338; *Wight v. Rindskopf,* 43 Wis., 344. Bonds or promises in consideration of "ease or favor" to prisoners held under criminal process are illegal. The case of *Buck v. Bank,* 27 Mich., 293, is so much like this case, and the decision of it was made by a Court of such eminence, the opinion being by *Judge Cooley,* that we may well rest our decision of this case upon it, as it covers fully the questions we have here to determine. The syllabus of that case thus states the substance of the decision: "B. having robbed the plaintiff, the defendant, a relative of B.'s, was induced to execute to plaintiff promissory notes in consideration of a promise by the plaintiff to petition the court to mitigate the punishment of B.: *Held,* that the notes were against public policy, and not enforceable by the plaintiff." After reciting the evil tendencies of a contrary rule, *Judge Cooley* says: "If the real inducement to the defendants to give the notes was the assurance of the officers that they would sign, or be more likely to sign, a petition in favor of R. M. Buck, then it is obvious that the transaction, stripped of whatever, in a legal point of view, was immaterial, was simply this: one party was to give a pecuniary consideration, and the equivalent was that another would sign, or promise to sign, or be more likely to sign, a petition for the mitigation of a criminal punishment. It is too plain for argument that such a transaction is not only wanting in the requisites of a legal contract, but that in its tendency it is immoral and pernicious. . . . As consequences can only be precluded by an inflexible rule of law, that services or assistance of any kind or any description, calculated or intended to influence the action of a court, except in the open and public modes of argument and evidence which the law provides for and allows, can never be a legal consideration for the promise of a pecuniary return. We do not stop to point out that assistance from pecuniary motives to lighten the punishment of a criminal is the same in nature and only different in degree from assistance from the like motives to shield him from punishment entirely. We prefer to put this case entirely upon the tendency such an understanding as the defendants set up must have to encourage deception of the judge, and to mislead him in the facts upon which his judicial action should be based. . . . The highest considerations of public policy demand that the pecuniary interests of individuals should not be recognized as legitimate motives to influence the action of official persons, and that in the case of courts most especially, every avenue should be carefully guarded against the intrusion of such motives. Caution is especially required in the case of parties injured by crime, who apply to avert or mitigate the penalty, because the court would be likely to give exceptional weight to their suggestions."

It was said in *Lindsay v. Smith,* 78 N. C., at p. 331, to be a matter of the gravest public concern that all infractions of the criminal law should be detected and punished. A party cannot take care of his private interests by depriving the State of a witness or an active prosecutor, which is the means relied on for the conviction of offenders; much less can he pollute the very fountains of criminal justice by suppressing an indictment already instituted against him. And it has been said that anything inconsistent with the impartial course of justice will not be upheld; even if the intent of the parties is not fraudulent, and although no evil resulted in the particular case. 1 Mod. Amer. Law, p. 125. It is the temptation to do wrong where money is to be received for the service, that does the harm, as it is likely to prevent, obstruct, or prejudice the due administration of justice. In this case it was not purely voluntary and gratuitous service that was to be performed, but it was to be done under the stimulus of a consideration, the promisor should receive for mitigating the punishment.

It would seem that in this case the object of the defendant, if not his sole object, was to collect his claim against Hinnant through resort to a criminal prosecution, so that he might later, by the use of duress, induce the plaintiff to come to the relief of his nephew, who was being prosecuted, as he did by giving the note, upon the illegal promise that J. E. Gill would induce the court to act with leniency toward the nephew.

If the defendant J. E. Gill had his debt against Hinnant secured, and had promised as a consideration therefor that he would use his influence to mitigate the punishment of Hinnant, the result would be that his interest in the further prosecution of the case would be greatly diminished, if not totally withdrawn, and he would cease to fulfill his duty in the vindication of public justice, or the enforcement of the law.

The State, as said in *Thompson v. Whitman, supra,* would thereby be "deprived of an active prosecutor," and, instead, would be met by passive indifference.

As was said in a somewhat similar case: "Although this case comes, as we think, under familiar principles of law, it is yet somewhat peculiar and novel in its facts; and in this decision we do not intend to trench upon the rights of respondents, or their friends and counsel in their behalf, in the use of all legitimate means of defense." *Barron v. Tucker,* 53 Vt., 338.

Our conclusion is that the court was right in the judgment it rendered upon the pleadings.

Affirmed.

ED. WEATHERS v. HETTIE BALDWIN.

(Filed 5 April, 1922.)

1. **Evidence—Nonsuit—Trials.**

The plaintiff's evidence on defendant's motion as of nonsuit thereon must be taken as true, and so considered, with all reasonable inferences to that effect which may be drawn therefrom.

2. **Negligence—Woman—"Willful Injury"—Intent—Evidence.**

For the arrest for a woman under the provisions of C. S., 768, for "willful injury," etc., an actual intent is not necessary if the defendant's negligence is so gross as to manifest a reckless indifference to the rights of others.

3. **Same—Arrest and Bail—Automobiles—Questions for Jury—Trials—Statutes.**

Evidence tending to show that the defendant in the action, a woman, was driving an automobile near the center of a large and populous town on Sunday, at the time the people were going to church, and with a speed in excess of that allowed by law, and without signal or other warning ran upon the sidewalk where the plaintiff was and struck with the machine and injured him, and apparently gave him no further thought, is sufficient for the jury to find an intent on the defendant's part to have willfully injured the plaintiff, and for the defendant's arrest under the provisions of C. S., 768.

Appeal by plaintiff from *Daniels, J.,* at September Term, 1921, of Durham.

This action was brought by the plaintiff to recover for injuries alleged to have been inflicted upon him by the willful wrong of the defendant in driving her motor car against the plaintiff on the public streets of Apex. Issues were submitted to the jury and verdict returned by them for $1,250, and judgment entered thereon. At a subsequent term, upon a motion of the defendant to set aside the verdict and judgment, the court refused to do so, but reduced the amount of the judgment to $1,000, and set aside the finding as to willful injury and ordered that an issue as to the injury being willful be submitted to a jury at a subsequent term of the court. The issue was accordingly submitted to the jury and evidence was taken upon the same, and at the close of the evidence the court held that there was no evidence of willful injury and nonsuited the plaintiff as to that issue.

Ed. Weathers, plaintiff, testified in his own behalf as follows: "My name is Ed. Weathers, and have lived in Durham four or five years. I know where the town of Apex is located. It is located about 20 miles from Durham, and is on the Seaboard Air Line Railway between Raleigh and Hamlet, N. C. I went down to Apex on 9 May, 1920. I was down there on Sunday, and went to, or started to, a funeral to be held at church. Apex is a good-sized town, and has a good many business houses. I was walking on the main street in the business section of the town, and at the intersection of two streets, when an automobile ran into me, driven by the defendant, Hettie Baldwin. At the time I was struck I was on the sidewalk, or the line of the sidewalk at the intersection of two streets. At that time I was going in the direction of the church, and it was 10 or 11 o'clock, I think. I heard a noise at the place I was struck, and just as I turned around to see, the automobile was right on me, and I was knocked down like this (describing manner). The place where I was struck was in the business section, where there are many stores, and I think a bank was on one corner and a drug store on the other. I can hear well, and as I heard the noise I looked around and was immediately struck. The white people were having church meetings, and there were lots of people on the street. The church was just above where I was struck. Hettie Baldwin approached me from the rear, at the rate, in my opinion, of 25 or 30 miles an hour. I was going in a southerly direction, and she was going south in the direction of New Hill. She neither blew her horn or gave any signal of her approach. I do not know how far her car ran after hitting me, but she went some distance and ran into a telegraph pole, breaking her lights and fender. I was knocked down, and learned soon afterwards that I was painfully hurt. I was bruised about the head and body, and was confined in bed for several weeks."

Cross-examination: "The defendant ran into a post after I was struck, and I could not tell why she did. I was raised at or near Apex, and had been there before. I went from Raleigh to Mississippi when young, with an uncle and aunt. I am no preacher, but went to Apex to church. I have been living in Durham since I came back from

Mississippi. I got to Apex about 10 o'clock, and went there to attend a funeral. I was going down Main Street when I was struck, about 10 o'clock. The main street runs toward New Hill, and I reckon is called Salem Street. The street runs north and south, and another street runs at right angles with it, I reckon. The street that crosses the main street, or Salem Street, runs toward the railroad. I was crossing Main Street, and going along the cross street. I was going toward the railroad before I turned down Main Street, to my right. When I reached Main Street I was going toward New Hill. I was coming down the cross street and was crossing from the bank building over to the next corner, across Main Street. I was struck on the sidewalk after crossing Main Street, and had made two or three steps going in the direction of New Hill. I went right from the bank corner to the other corner where the street crosses, and was struck there, the corner opposite Mr. Olive's house. I do not know whether there is a drug store on the other corner or not. There is a bank on one corner, a drug store, I guess, or brick building, on the other, and Mr. Olive's house on the other. I had crossed the street and was on the sidewalk, somewhere near the Olive residence when I was struck. I do not think the sidewalk was paved. There was no whistle or horn blown. The first I saw or heard of the automobile, it was right on me. I was near enough so that when I looked around I was struck. I looked around. I do not know whether I stooped or not. I fell. I do not know what part of the car struck me. Some colored person helped me up, but I do not know his name. She did not get out of the car, and if she said anything I do not know it. If she asked me whether I was hurt I did not know. I told the colored man I was hurt; I did not say to Mr. Wall or others that I was hurt that I remember. If I saw Messrs. Seamore, Wall or Scott I do not know it. I do not know that they were standing near. I do not remember any white men coming to me at all. None except a big yellow fellow. He carried me to the doctor that day, but he was not at home. He carried me to the church and turned me over to another fellow. I did not go into the church. I did not know where the church was. I lay outside on the grass under the trees. The fellow did not stay with me all the time, but my sister-in-law did."

Redirect examination: "I did not come to Durham until that night. I came on the train and called a physician that night.

"Q. How long was he attending you? A. Several weeks. (Objection; objection sustained. Extent of injury, together with conduct of plaintiff, admitted by the court.)

"Q. What effect did the injury have on you, whether it made you sick or not? (Objection by defendant; objection overruled; defendant excepts.) A. I got sick and spit up blood for a week after I was struck.

I lay in bed and there was a great knot on the back of my head caused by the blow. My bowels were swelled, and my neck was wrenched."

Recross-examination: "I did not tell any one I was not hurt. I called Dr. Strudwick. I do not know how long he attended me. I did not have a doctor in Apex. I have not had the doctor in court."

H. W. Hursey, witness for plaintiff, testified: "I have known Ed. Weathers since he came back from Mississippi. His character is good. I recall the occasion on which he was injured."

The issue came on to be tried by *Daniels, J.* The court held that there was no evidence of willful injury, and nonsuited the plaintiff, whereupon he excepted and appealed.

J. W. Barbee for plaintiff.
R. O. Everett and Percy J. Olive for defendant.

WALKER, J. We have set forth, in the statement of the case, only the testimony of the plaintiff given in his own behalf, and that of one of his witnesses, as upon a motion to nonsuit the evidence introduced by the plaintiff must be taken as true, and so considered with all reasonable inferences which may be drawn therefrom. *Snider v. Newell,* 132 N. C., 614; *Brittain v. Westhall,* 135 N. C., at 495; *Biles v. R. R.,* 143 N. C., 79. If the testimony is thus construed, the case should have been submitted to a jury to find whether the defendant had not only wrongfully injured the plaintiff, as was done at a former term of the court, but whether she committed not only a wrongful injury, but also a willful injury. C. S., 768, provides: "No woman shall be arrested in any action except for willful injury to person, character, or property."

It would be useless to set out here the numerous definitions of the word "willful" or "willfully," the former being the term used in the statute. It is sufficient to consider and adopt one of the definitions, which will answer for the purpose of this appeal. In *Jones v. Bland,* 182 N. C., 70, at p. 73, the question arose as to what would constitute "willfulness or wantonness," and the Court held it to be "negligence so gross as to manifest a reckless indifference to the rights of another," citing *Everett v. Receivers,* 121 N. C., 519. This, as being one of the definitions of "willful injury" or "willful tort" was accepted and approved in *Ill. Cent. R. Co. v. Leiner,* 202 Ill., 624, and *Cin. etc., R. R. Co. v. Cooper,* 120 Ind., 469. In the latter case the Court held that it was correct to charge the jury as follows: "To establish the charge of willfulness, as set out in the fourth paragraph of the complaint, I instruct you that an actual intent to do the particular injury alleged need not be shown; but if you find from all the evidence that the misconduct of the defendant's servants was such as to evince an utter disregard of consequences, so as to inflict the injury complained of, this may of itself tend to establish willfulness." The Court said, in this connection, that the instruction not only expressed correctly the rule of law applicable to such cases, but that recklessness, reaching in degree to an utter disregard of consequences, may supply the place of a specific intent. In the case of *Ill. Cent. R. R. Co. v. Leiner, supra,* it was said by the Court that to constitute willful and wanton negligence it is not always necessary to prove that the defendant's servants are actuated by ill-will towards the plaintiff. In *East St. Louis Connecting Railway Co. v. O'Hara,* 150 Ill., 580, it is said: "If it be true, as the evidence tends to show, that the defendant's servants, at the time plaintiff was injured, were running their engine in the dark, without a headlight, or a bell ringing, and at a high and dangerous rate of speed, along a much-frequented street, and where many persons were likely to be passing on their way to the ferry landing, or otherwise, such acts would be liable to the construction of being in wanton and willful disregard of the rights and safety of the public generally, so as to amount in law to wanton and willful negligence. And it was not necessary, in order to raise an inference of such negligence, to prove that the defendant's servants were actuated by ill-will, directed specifically towards the plaintiff, or should have known that he was in such position as to be likely to be injured."

Thompson on Negligence (vol. 1, sec. 22) thus defines a willful injury: "An entire absence of care for the life, the person, or the property of others, such as exhibits a conscious indifference to consequences, makes a case of constructive or legal willfulness, such as charges the person whose duty it was to exercise care, with the consequences of a willful injury." In *Ill. Cent. R. R. Co. v. Leiner, supra,* the Court approved this instruction to the jury: "What is meant by willful and wanton misconduct is such conduct as amounts to an intentional wrong, or of such a reckless character as shows that the person or persons guilty of such misconduct were at the time acting in such a manner as shows that they had an utter disregard for the safety and lives of other persons." See, also, *Tolleson v. So. R. R.,* 80 S. C., 7.

It may be that there is testimony in this case to show an actual intent to willfully commit the injury, but whether this is so or not, there is sufficient evidence of an intent to do so, by inflicting injury recklessly and in total disregard of the rights and safety of others. The defendant, if the evidence be true, was in open and almost defiant violation of the statutes as to the running of automobiles in cities and towns, and her conduct can rightfully be characterized as nothing less than reckless, and as exhibiting no regard whatever for the lives and safety of others who were at the time using the streets, as they had a lawful right to do, at the hour of the morning service in the churches of a large and populous town. It is hard to conceive how the defendant could think that she would not injure some one on the streets as she really did. But her liability to the defendant depends upon how the jury will view the testimony. She may be right, and it may so appear upon the trial of the issue, but the jury must decide the question at issue.

There was error in the ruling of the court withdrawing the issue from the jury.

New trial.

W. A. FRY, ADMINISTRATOR, v. SOUTHERN PUBLIC UTILITIES COMPANY AND STANDARD ICE AND FUEL COMPANY.

(Filed 5 April, 1922.)

1. Negligence—Children—Employer and Employee—Master and Servant—Instructions of Master—Custom—Waiver.

Where there is evidence that the plaintiff's intestate, a boy under twelve years of age, was killed by the negligence of the defendant's driver on its ice wagon as the intestate was riding on the rear step thereof, and the defendant has introduced evidence that it had instructed its drivers not to permit children to ride on its wagons, it is competent for the plaintiff to show that the observance of this instruction was not insisted on, and its nonobservance was either known to the defendant or should have been known from its long continued violation, and that therefore the defendant had either acquiesced therein, or had consented to its repeal, or waived obedience to it.

2. Same—Cities and Towns—Ordinances.

Where there is evidence that the plaintiff's intestate, a boy about twelve years of age, was killed by the negligence of the driver on defendant's ice wagon, while the intestate was riding on the rear step of the wagon, in attempting to drive across a track in front of a moving street car, and the defendant has introduced an ordinance of the city prohibiting children from riding on wagons of this kind without the consent of the driver, evidence that children were habitually accustomed to ride on these wagons and were encouraged therein by the defendant's drivers, and that the driver of this particular wagon saw the intestate at the time he was riding thereon, and consented to his riding thereon, is sufficient to show that the intestate was not acting in violation of the ordinance in question.

3. Same.

Where defendant ice company has permitted the custom of children to ride on its wagon in delivering ice to become established in violation of a city ordinance, it cannot take advantage of its own wrong by setting up the ordinance in defense to an action for the negligent killing of the plaintiff's intestate, a boy about twelve years of age, upon the ground that the intestate was himself violating the ordinance at the time he was killed.

4. **Negligence — Contributory Negligence — Children—Instructions—Appeal and Error.**

While a child is not held to the same accountability as one of mature years for contributory negligence, it is held to that degree of care that ordinary prudence would require one having the mental and physical development of the particular child, under the circumstances of the injury; and an instruction that a boy, something less than twelve years of age, could not be guilty of contributory negligence, and also omitting the element of proximate cause, or the last clear chance, is reversible error.

5. **Negligence—Wantonness—Contributory Negligence—Defenses.**

The doctrine of contributory negligence does not apply when the defendant's negligence in causing the injury in question is reckless, wanton, and in total disregard of the plaintiff's rights, and the verdict of the jury upon a trial involving this question may be construed as an affirmative finding when it so appears if viewed in the light of the charge and the evidence in the case.

6. **Same—Evidence—Employer and Employee—Master and Servant—Respondeat Superior—Appeal and Error—New Trials.**

There was evidence in this case that the driver of the defendant's ice wagon knew that the plaintiff's intestate, a boy about twelve years of age, was riding on the rear step of the wagon, contrary to a city ordinance, and that a collision proximately caused the death of the intestate as the driver, at a place forbidden by the city ordinance, attempted to drive diagonally across a street car track in front of a rapidly moving street car, where the situation itself and the time of the act was observably dangerous for such purpose: *Held*, while the violation of the ordinance is not alone conclusive, it, with the other evidence, is sufficient to sustain a verdict of the jury finding that the negligence of the driver was reckless and wanton, and in utter disregard of the intestate's rights, for which the defendant is responsible as principal under the doctrine of *respondeat superior*, if it was the proximate cause of the injury alleged.

CLARK, C. J., concurring in new trial.

APPEAL by defendant Standard Ice and Fuel Company from *Lane, J.*, at the May Term, 1921, of MECKLENBURG.

This action was brought to recover damages for the death of plaintiff's intestate, alleged to have been caused by the defendant Standard Ice and Fuel Company's negligence.

On 28 June, 1919, plaintiff's son and intestate, Perry Fry, was instantly killed in a collision between an ice wagon of the Standard Ice and Fuel Company and a street car of the Charlotte Street Railway Company, at a point on Tryon Street about fifty feet south of the intersection made by Tryon and Ninth streets in the city of Charlotte. On that day Perry Fry was under 12 years of age, his exact age being 11 years, 10 months, and 23 days.

The railway company was repairing its tracks on North Tryon Street from Seventh to Ninth streets, and had dug up the concrete from between the rails and placed it in a pile, about two feet wide at the bottom and eighteen inches to two feet in height, at the end of the crossties along the east side of the track, which had so narrowed the driveway on the right or east side of the street that there was room for only one vehicle to travel at a time from Seventh to Ninth Street. This pile of concrete extended from Seventh Street to Ninth Street, with the exception of an open space about thirty feet in length just south of and about fifty feet distant from Ninth Street. It was in this open space that the collision occurred.

It was Saturday afternoon, about 4:30 o'clock, and the ice wagon, having completed its work for the day on Seventh Street, came out of Seventh into Tryon and proceeded northward on Tryon on its return to the ice plant, traveling on the east side of the street between the piled-up concrete and the curb-stone of the sidewalk. C. L. Hill, the white man in charge of the wagon, and whose duty it was to ride on the rear step of the wagon, had abandoned the wagon at Seventh Street, entrusting its safe return to the plant to the negro driver, Will Ferguson, and a half-grown negro helper, Robert Kinston. The latter, who was riding in the front seat with the driver, was so engrossed in eating his delayed mid-day lunch that he had no knowledge of the collision or its attendant circumstances except that the impact thereof threw him out of the wagon.

Somewhere between Seventh Street and the point of collision, a very congested section of the city, Perry Fry, and another small boy of about the same age, got on the rear step of the ice wagon, young Fry riding on that end of the step nearest the car tracks. This step was fourteen inches from the ground. Before reaching the open space the driver heard boys' voices behind his wagon, and on looking back saw young Fry riding upon the rear step. When the wagon came to the open space in the pile of cement fifty feet south of Ninth Street, the horses, without warning, were driven upon the street car track in a diagonal course toward West Ninth Street, and very near an approaching street car. The front wheels of the ice wagon were upon the car track when the street car, also running north, struck the hub of the left front wheel of the wagon, knocking the front of the wagon away from the tracks and throwing the rear of the wagon in toward the street car. Young Fry was thrown from the rear of the ice wagon under the street car between the trucks, and when the car was stopped within its own length he was lying under the rear trucks of the street car. The left horse was down on the track with its feet in the fender of the car. Young Fry was dead when removed from under the street car.

It had been the custom for many years for little children to ride upon the rear step of defendant's wagons for the pleasure of the ride as well as to get ice. This custom was known to the defendant, and had been constantly permitted by the drivers of its wagons. There was danger in children thus riding on the wagons of this defendant, which was also known to the defendant.

The city of Charlotte had, before the time of this fatality, adopted the following ordinance, which was then in force: "No vehicle shall be turned unless a signal shall previously be given by the whip or hand indicating the direction in which the turn is to be made. The driver of any vehicle, upon a track in front of a street car, shall, upon signal from the driver or motorman of said car, turn to the right of the track. The vehicles moving slowly shall keep as close as possible to the curb on the right of the street, allowing more swiftly moving vehicles free passage to their left. A vehicle overtaking another shall pass on the left side of the overtaken vehicle, and shall not pull over to the right until entirely clear of the vehicle passed. A vehicle, when turning to the left to enter an intersecting street, shall slow down to a speed of five miles per hour, and shall not turn until it shall have passed beyond the center of such intersecting street."

There was testimony that the defendant had knowledge of this custom of small children riding on its wagons, and also that it had actual knowledge, through its driver, that the small Fry boy was on its wagon some time before the collision occurred which resulted in his death. Will Ferguson, the driver, testified: "As I was driving down Tryon Street that afternoon, between Eighth and Ninth streets, there was an opening just ahead of the left side where no broken concrete and rock had been piled upon or in the street. I heard a boy's voice behind my wagon say 'Come on up,' 'Come on up,' and I looked around through the wagon and saw this little white boy who got killed standing on the rear step." The driver did not stop to put the boy off, nor did he tell him to get off. He drove his wagon through the open space 50 feet from the street intersection and upon the car track and close to the approaching street car. W. J. Dellinger testified that when the wagon looked like it was going to cross, "the street car was not far south of that open space, they were right close together." R. F. Rankin testified: "The street car and the ice wagon were very close together when I noticed the ice wagon," before the collision. Willie Wilson, who was on the street car, testified that the "car was somewhere about the middle of the block" when the horses started upon the tracks. R. A. Galloway testified that the horses' heads were about six feet from the open space when the car was about the middle of the block. Neal Elliott, the motorman, testified that the car was only fifteen feet away when the horses started upon the track. M. T. Kelley, Fred Stewart, and W. P. Chambers testified that the street car was twenty feet away when the horses started to cross the track. Not only was the wagon driven upon the car tracks in close proximity to the approaching car, but in turning to cross the tracks the driver did not hold out his hand or give any signal of his intention to cross. Neal Elliott, the motorman, testified, "The driver did not throw out his hand or warn me." Fred Stewart, who was standing at the corner of Ninth Street in front of the wagon and in a position to see the actions of the driver, testified: "Saw the ice wagon and the driver when the horses started across the track. The driver just started across there and the street car hit the front wheel. Did not see the driver throw out his arm; he did not throw out anything. He did not look." This witness further testified: "The driver of the ice wagon was not paying any attention to anybody or anything. He did not look to the side of him, nor behind him, nor do anything except to drive the horses across there at a slow trot; he moved across diagonally."

The driver of the wagon testified that just as he reached this open space an automobile passed on his right next to the curb, and that as a result his horses shied and thus got upon the car tracks. Nowhere do we find in the record any evidence which supports the testimony of the driver in this regard. The eye-witnesses introduced by both the plaintiff and the defendant, except the driver, said the horses were driven upon the tracks, and that no automobile passed the ice wagon at or near the time of the collision. C. G. Terrell, the only eye-witness introduced by the defendant, except the driver, testified: "The horses were responsive to the driver; they moved as if they were being moved by the driver." And again the defendant's same witness testified: "When I saw the horses start to turn across the track the street car was between the center of the block and Ninth Street. The street car was not ringing any bell, and from that time on the horses proceeded diagonally across the track in the open space and the street car came right after them."

Nor was there sufficient room between the concrete piled up along the rails and the curb for an automobile to pass the ice wagon. W. J. Dellinger testified: "There was plenty of room to go along for one, but I don't hardly believe there was room for two." R. F. Rankin testified: "There was only one passway. This obstruction on the side of the street would not permit but one car to go through there. An automobile could not pass the ice wagon as it was going down there." J. D. Johnson, a police officer, testified: "Two automobiles could not have passed in there from Seventh Street down to Ninth Street with the material piled up there to the right of the rail."

The evidence in the record appears to contradict the driver, and shows that no automobile did pass the ice wagon. W. J. Dellinger, who was driving in an automobile in the same direction with the wagon and about a block and a half behind the ice wagon, testified: "Saw no automobile behind the ice wagon. Could not see the front of ice wagon. There was not any vehicle to the side or behind it from the time I first saw it and the collision occurred. There was not any automobile passed the ice wagon after I saw it. I did not see an automobile come and go by this ice wagon and cause the horses to shy across the track; none passed the ice wagon. No automobile between me and the ice wagon; nothing but the ice wagon and the street car in front of me." R. F. Rankin, who was in the automobile with Dellinger, testified: "There was no car or other vehicle between me and the ice wagon when I saw it. No car passed the ice wagon about the time of the collision or before. I was going down the street behind the street car and the ice wagon. If there had been an automobile between me and the ice wagon I certainly would have seen it." Even the negro helper, Robert Kinston, riding in the front seat with the driver, saw no automobile pass the ice wagon.

A perusal of the record will tend to show, as the jury evidently found, that Hill, the man in charge of the wagon, had abandoned it at Seventh Street; that the driver drove across the street fifty feet south of the intersection in violation of an ordinance of the city of Charlotte; that in doing so he failed to give any signal or warning of his intention to cross in violation of the ordinance, and that, without looking or listening, and knowing that young Fry was in a position of danger on the back of his wagon, as the evidence tends to show and the jury found, he drove across the street in dangerous proximity to an approaching street car. There was at all events sufficient evidence to carry this question of fact to the jury.

Other material facts will be noticed in the opinion of the Court.

The judge charged the jury, as to the fifth issue, as follows: "If you find by the greater weight of the evidence that the street car in question was being operated at a lawful rate of speed, and that the motorman had given all necessary and proper signals of the approach of the car to the ice wagon in question, and also of his approach to the Ninth Street crossing, notwithstanding which facts, the driver of the ice wagon, after he saw, or by the exercise of ordinary care could have seen, the approach of the street car, negligently and recklessly, without signal or warning of any kind, and without looking or listening, drove his wagon upon, or dangerously near, the said street car track in such close proximity to the approaching street car as to render it impossible for the motorman in charge of said car to avoid a collision with the wagon, either by slackening the speed of his car or stopping the same, after he saw a collision was imminent, and that the driver knew the perilous situation of the ice wagon, then the court charges you that the driver of the ice wagon would be guilty of willful negligence, and if you find such negligence was the proximate cause of the intestate's death, then you will answer the third issue 'Yes.'" And the judge further charged the jury, on the fourth issue, as follows: "If the jury find by the greater weight of the evidence that with knowledge of the fact that the boy was riding on the rear step of the ice wagon, said driver willfully and wantonly drove his wagon across the said car track, without either looking or listening for the approach of a car or giving any signal or warning of his intention to drive the wagon on or across the track, and shall further find by the greater weight of the evidence that the motorman in charge of said street car saw, or by the exercise of ordinary care could have seen, this boy on the rear steps of the ice wagon, if you find he was there, notwithstanding which he willfully operated said car at a speed between 20 and 30 miles an hour between Eighth and Ninth streets, in violation of the ordinance of the city of Charlotte, and that the aforesaid willful and negligent acts of the motorman and driver of the car and wagon were the sole and only concurring proximate causes of the plaintiff's intestate's death, then you will answer the fourth issue 'No,' independently of whether the plaintiff's intestate was a trespasser upon the ice wagon at the time of the collision or not."

The jury returned the following verdict:

"1. Was the plaintiff's intestate killed by the joint and concurrent negligence of the defendant, as alleged in the complaint? Answer: 'No.'

"2. If not, was the plaintiff's intestate killed by the negligence of the defendant Southern Public Utilities Company, as alleged in the complaint? Answer: 'No.'

"3. If not, was the plaintiff's intestate killed by the negligence of the defendant Standard Ice and Fuel Company, as alleged in the complaint? Answer: 'Yes.'

"4. Did the plaintiff's intestate, by his own negligence, contribute to his death? Answer: 'No.'

"5. What damages, if any, is the plaintiff entitled to recover? Answer: '$5,000.'"

Judgment on the verdict, and defendant Standard Ice and Fuel Company appealed.

E. T. Cansler and D. B. Smith for plaintiff.

James A. Bell and Edgar W. Pharr for defendant Standard Ice and Fuel Company.

WALKER, J., after stating the case: If the first assignment of error is sufficiently stated under our rules, we are of the opinion that it is without any substantial merit. It was competent to prove the custom of small boys to jump upon the rear step of the wagon to ride and get bits of ice for several reasons, and, among them, to answer the contention of defendant that instructions had been given to the drivers not to permit riding on the wagon by small boys. If such order was given, the plaintiff surely was entitled to show that it had been constantly violated for a long time, with the knowledge of the drivers and those in charge of the wagon, from which the jury could well infer that the owner of the wagon had notice of its nonobservance, and that it was an order of the company more honored in the breach than in the observance, and, in legal contemplation, it had been abrogated, or at least waived. *Biles v. R. R.*, 139 N. C., 528; *Haynes v. R. R.*, 143 N. C., 154; *Smith v. R. R.*, 147 N. C., 603; *Bordeaux v. R. R.*, 150 N. C., 528; *Railway Co. v. Mobley*, 6 Ga. App., 33; *P. L. Co. v. Whitzel*, 118 Va., 161; *Robinson v. R. R.*, 71 W. Va., 423; *Railroad Co. v. Reager*, 96 Tenn., 128. It has been held generally that if a rule is made for the safety of the servant or others, but its customary violation has continued so long that the master either knew of it, or could by the exercise of ordinary care have found it out and acquiesced in it, he is presumed to have consented to its repeal, or to have waived obedience to it. *Smith v. R. R., supra; Biles v. R. R.*, 143 N. C., 78. But so far as the rule, or order to the drivers, in this case is concerned, it does not appear to have been observed at all, and boys were allowed to ride on the rear step of the wagon at their pleasure, even when the manager of it, who had left on this occasion, was there. All this evidence, and more, is sufficient to show, at least, the tacit consent of the driver and manager to such a course of conduct by them, and the jury have doubtless so found. If this be so, and it can hardly be disputed, the act of this young boy was not within the prohibition of the city ordinance forbidding it only when it is without the consent of the driver, or person controlling its movements and management. As this is a question of capital importance in the decision of the case, we will refer to some of the evidence bearing upon it: For many years it had been the habit and custom for small children to get upon and ride upon the rear of defendant's ice wagons, both for the pleasure of riding and for the purpose of getting small pieces of broken ice. In doing so they rode from door to door, and frequently for considerable distances out of the neighborhood in which they lived. So general had been this practice and so long continued that one witness, in referring to it, said: "It has always been." This custom was known to the officers and agents of the defendant company, or by the exercise of ordinary care they should have known it, and in legal contemplation the defendant did know of this custom. But aside from this legal presumption, actual knowledge of this custom, it seems, was brought home to the defendant, its officers and agents. C. L. Hill, the man in charge of this particular wagon, testified: "Little fellows, six years old up to eleven and twelve, had this habit of getting on the wagon." J. A. Eagle, assistant manager of the defendant company, in testifying with regard to this custom, said he had observed it "ever since he had been in the ice business." C. R. Moore, manager of the defendant company, said he knew of the existence of the custom "in a limited way." More than that, the defendant's driver knew of the custom, permitted it to grow up, and even encouraged it, offering the inducement of cool rides and bits of cracked ice. But the defendant contends that the admission of the evidence as to this custom was error, upon the general ground that it was an illegal custom and that it grew up in violation of an ordinance of the city of Charlotte, which declares "that no one shall ride or jump onto any vehicle without the consent of the driver thereof; and no person, when riding, shall allow any part of his body to protrude beyond the limits of the vehicle, nor shall any person hang on to any vehicle whatsoever." If that position were sound, then any defendant could escape the consequences of his wrongful act by the mere device of alleging and proving that his conduct had been unlawful. But even if the position of the defendant be a correct one, then it is equally true, as the record clearly shows, that this custom had grown up with the consent of the drivers of the defendant's wagons; and, therefore, it was not forbidden by the ordinance. In *Ferrell v. Cotton Mills,* 157 N. C., 528, and many other cases to like effect, evidence was admitted to show the custom or habit of small children to play upon premises where they were technical trespassers. If in those cases evidence was competent which proved a custom, in violation of the laws against trespass, then certainly in this case evidence of a custom in violation of an ordinance of the city of Charlotte was competent. Having permitted this custom to grow up, this defendant cannot take shelter behind his own wrong. "A habit of doing a thing is naturally of probative value as indicating that on a particular occasion a thing was done as usual; and, if clearly shown as a definite course of action, is constantly admitted in evidence." 1 Greenleaf's Ev. (16 ed.), sec. 14 J.

Leaving this subject, we come to the next material question in the case. Having concluded there was evidence that young Fry did not violate the ordinance, or that there was evidence that he did not, and the jury so found, was he guilty of contributory negligence? We take this matter up now before considering the issue as to defendant's negligence, as it is more nearly related to, and connected with, the one just before discussed. The jury found that he was not guilty of any negligence himself which contributed to his injury and death, but the defendant contends that this answer of the jury was induced by an error of the judge in his charge to them, which they say is that "as young Fry was under twelve years of age, he could not be guilty of negligence." He was one month and seven days under twelve. This, we think, was error. The error consisted in charging the jury that the boy being under twelve years of age was incapable of committing the alleged negligent act which it is claimed contributed to his injury. The responsibility of an infant for contributory negligence is not necessarily a question of law and some expressions in our reports apparently to the contrary are misleading and contrary to the accepted and approved principle which governs in such cases. The question was so fully discussed, with a copious citation of the well considered cases in *Alexander v. Statesville*, 165 N. C., 527, that much further comment would seem to be useless. It was there held, as stated in the seventh headnote, that while a child of tender years is not held to the same degree of care as one of mature years in avoiding an injury arising from the negligent act of another, it is ordinarily a question of fact for the jury to determine, in his action to recover damages therefor, whether, under the circumstances, and considering his age and capacity, he should have avoided the injury complained of by the exercise of ordinary care; and in that case it appearing that the plaintiff was a bright boy of about 7 years of age, it was held that the court properly left the issue of contributory negligence to the jury. We cannot approve all that was said, with respect to this question, in *Baker v. R. R.*, 150 N. C., 562, and *Foard v. Power Co.*, 170 N. C., 48, though expressions will be found therein which seem to agree with the view herein stated. In *Alexander v. Statesville, supra*, we followed the rule as adopted by the Supreme Court of the United States in *Railroad Co. v. Gladmon*, 15 Wallace (U. S.), 401 (21 L. Ed., 114), and *Railroad Co. v. Stout*, 17 Wallace (U. S.), 657 (21 L. Ed., 745). *Gladmon's case* has been followed by this Court in *Manly v. R. R.*, 74 N. C., 655; *Murray v. R. R.*, 93 N. C., 92; *Bottoms v. R. R.*, 114 N. C., 699. In *Bottoms' case* the Court refers to *Gladmon's case* and *Robinson v. Cone*, 22 Vt., 213, as stating the correct rule, and takes this passage from the *Robinson case:* "All," says *Judge Redfield*, in delivering the opinion, "that is required of an infant plaintiff in such a case (where a child was injured in a highway) being that he exercise care and prudence equal to his capacity." The passage which we have taken from *Gladmon's case* was quoted by *Chief Justice Smith*, with full approval, in *Murray v. R. R., supra*, as containing a correct statement of the rule applicable in such cases. Numerous other cases are cited in *Alexander v. Statesville, supra*, at p. 536 of 165 N. C. It was held in *Westerfield v. Levis*, 43 La. Ann., 63 (cited in the *Alexander case*), that the rule which exempts a child of tender years from responsibility, while it may not operate justly in every possible case, on the whole promotes the ends of justice, and the Court followed the authorities which held that a child of the age of appellant is *prima facie* exempt from responsibility, but also held that testimony is admissible to show the contrary, citing many authorities. We said in the *Alexander case* that upon the question of plaintiff's contributory negligence, the judge properly confined his charge to the second issue, which separately and independently involved an inquiry into that matter, as to the plaintiff's age and his incapacity arising out of his tender years, and it may be said that the question of contributory negligence on his part is not to be determined alone by the fact of his youth, except in extreme cases; but other considerations enter into the question, as, for instance, his degree of capacity or intelligence. Some boys are brighter, smarter, more precocious, and more capable than others who are much older, and better able to take care of themselves. The youth of the person must be considered, of course, but, with the qualifications already made, it is not the only test, and the presumption of incapacity to protect himself is not always a conclusive one. In *Rolin v. Tobacco Co.,* 141 N. C., 300, this Court said: "It is hardly necessary to add that contributory negligence, on the part of the minor, is to be measured by his age and his ability to discern and appreciate the circumstances of danger. He is not chargeable with the same degree of care as an experienced adult, but is only required to exercise such prudence as one of his years may be expected to possess. As the standard of care thus varies with the age, capacity, and experience of the child, it is usually, if not always, when the child is not wholly irresponsible, a question of fact for the jury whether a child exercised the ordinary care and prudence of a child similarly situated; and if such care was exercised, a recovery can be had for an injury negligently inflicted, no matter how far the care used by the child falls short of the standard which the law exacts for determining what is ordinary care in a person of full age and capacity," citing *Am. C. and F. Co. v. Armentrodt,* 214 Ill., 509; *Plumly v. Birge,* 124 Mass., 57; 7 A. & E., 409. Labatt on Master and Servant (Ed. 1904), sec. 348, says that the essential and controlling conception by which a minor's right of action is determined with reference to the existence or absence of contributory fault is that his capacity is the measure of his responsibility. If he has not the ability to foresee and avoid the danger to which he may be exposed, negligence will not be imputed to him if he unwittingly exposes himself to that danger. For the exercise of such measure of capacity and discretion as he possesses, he is responsible. And quoting from *Gladmon's case, supra,* this Court further says: "The rule of law in regard to the negligence of an adult and the rule in regard to that of an infant of tender years is quite different. By the adult there must be given that care and attention for his own protection that is ordinarily exercised by persons of intelligence and discretion. If he fails to give it, his injury is the result of his own folly, and cannot be visited upon another. Of an infant of tender years less discretion is required, and the degree depends upon his age and knowledge. Of a child of 3 years of age less caution would be required than one of 7; and of a child of 7, less than one of 12 or 15. The caution required is according to the maturity and capacity of the child, and this is to be determined in each case by the circumstances of that case."

But if it be admitted that the boy was guilty of contributory negligence, the question whether it was the proximate cause of his death remains to be determined by the jury, under proper instructions from the court. "Where defendant, by exercising due care, can avoid the consequences of plaintiff's negligence, or he can discover plaintiff's peril in time to avoid injuring him, he is liable on his failure so to do." *Cullifer v. R. R.,* 168 N. C., 309. "The doctrine of the last clear chance applies where the defendant, after he discovers plaintiff's peril, or in the exercise of ordinary care should have discovered it, negligently fails to avoid the accident." *N. S. R. Co. v. White's Admr.,* 84 S. E., 646. The jury have found, with evidence to warrant the finding, that the driver knew the boy was on the rear step of the wagon, and had given him permission to ride there, and that, notwithstanding this knowledge, he drove onto the track, in front of the fast approaching street car, and his wagon was struck by the same, and this caused the intestate's injury and death. The driver of the defendant testified that some one drove an automobile between him and the curb of the sidewalk, which frightened his horses and caused them to turn and drag his wagon onto the track, but there was evidence to the contrary, and especially by a witness, who was riding in his automobile and a little behind the ice wagon, and who stated that he was in full view, and that no such thing occurred, and the jury, under the evidence and the instructions of the court, not only found that the driver's testimony was not true, but that, on the contrary, he drove both "negligently" and "recklessly" upon the track. This appears from the instruction of the court on the third issue, as set forth in our statement of the case and the verdict. He also drove on the track "willfully and wantonly," as appears from the instruction of the court upon the fourth issue. There was evidence that the wagon was driven upon the track in violation of a city ordinance, which provided that the driver, in order to cross over to the other side of the street, should make his turn at the intersection of Tryon and Ninth streets, or if he intended to go as far north as Tenth Street, then at the intersection of Tryon with Tenth

Street, and that, by the ordinance, he should have turned in on the north side of Ninth Street, or of Tenth Street, depending upon where he expected to make the crossing. The plaintiff contends, therefore, that he was acting, not only negligently, recklessly, willfully, and wantonly, but criminally, as he was violating the ordinance. We must construe the verdict always in the light of the evidence and the charge of the court, and especially as resolving all inferences in favor of the successful party. *Aldrich v. Railway Co.,* 79 S. E., 316. We have held repeatedly that the verdict must be interpreted "and allowed significance" by reference to the pleadings, testimony, and the charge of the court. *Owens v. Ins. Co.,* 173 N. C., 373; *Taylor v. Stewart,* 175 N. C., 199; *Bank v. Wysong,* 177 N. C., 284. If we follow these decisions and interpret this verdict by proper reference to the pleadings, evidence, and charge, there can be no doubt as to what was the conclusion of the jury, which is that the driver of the wagon, regardless of any contributory negligence of the boy, acted not only negligently when he had the chance to save him, but willfully, recklessly, and wantonly, and against such conduct as this finding implies, the contributory negligence of the boy is no protection or bar to the plaintiff's recovery. If the party injured is himself ever so negligent, the one who caused that injury is liable to him for the ensuing damages, if he was aware of the dangerous situation and caused the damage willfully, wantonly, or even recklessly, that is, if he did so without regard to the consequences of his act and being indifferent to the rights of others. It is said in a standard treatise: "The doctrine that contributory negligence will defeat recovery has no application where the injury is the result of the willful, wanton, and reckless conduct of defendant. . . . In order that one may be held guilty of willful or wanton conduct, it must be shown that he was conscious of the surroundings, and was aware, from his knowledge of existing conditions, that injury would probably result from his conduct, under the circumstances, and, with reckless indifference to consequences, he consciously and intentionally did some wrongful act or omitted some known duty which produced the injurious result." 29 Cyc., 509-510. And in *Brendle v. Spencer,* 125 N. C., 474, this Court held: "It is settled that contributory negligence, even if admitted, is no defense to willful or wanton injury. The finding of such injury by the jury eliminates all question of negligence on both sides. The defendant company is responsible for the willful and wanton injury occasioned by its employee while on duty in its service."

We do not mean to say that the driver's act in crossing at the wrong place, contrary to the ordinance, if he did so, would of itself constitute willfulness, but it may be considered as one of the facts or circumstances in evidence tending to show that his act was willful, as being entirely regardless of the law and the safety of others. We have held that where a statute or an ordinance is violated it is such a distinct legal wrong that if it be the proximate cause of the injury to another, it will then constitute an actionable wrong or tort, but the jury must find the facts essential to the application of this principle. *Stone v. Texas Co.,* 180 N. C., 546, where the matter is fully discussed.

We finally conclude that there was some evidence from which the jury could find that the driver of the wagon was guilty of culpable negligence, or a distinct legal wrong, as hereinbefore defined by us, and the defendant itself may, therefore, be liable to the plaintiff upon the principle of *respondeat superior,* the driver being its servant and his illegal acts being imputable to the defendant. If knowing that the boy was on the wagon, and he was there by the driver's consent, or permission, the defendant would have to answer for his negligence if he exposed the boy to impending danger in crossing the track too near to the approaching street car, and especially so if the act of crossing the track under the circumstances was forbidden by the ordinance, and was the proximate cause of the injury to the boy which caused his death.

This Court will not undertake to decide the case upon the evidence, but will leave its weight and sufficiency to the jury. It may be that the defendant's construction of the evidence is the correct one, and that the plaintiff's is not. The Court must not be understood as intimating any opinion at all upon the weight of the evidence, or any of it, but as leaving its sufficiency to establish the contention of the plaintiff, or that of the defendant, entirely to the jury, with proper directions from the court.

The error of the judge as to the contributory negligence of the boy is of sufficient importance to have been prejudicial to the defendant, and because of it a new trial must be had in order that the case may be submitted again to the jury under proper instructions.

New trial.

CLARK, C. J., concurring in a new trial: In this case the plaintiff's intestate, a boy 11 years, 10 months, and 23 days old, jumped up behind an ice wagon passing through the streets of Charlotte and was killed in a collision between the ice wagon and the car of the Charlotte Street Railway Company. There was an ordinance of the city of Charlotte which made his conduct a misdemeanor, and there was a standing order by the Standard Ice and Fuel Company, the owners of the wagon, against such conduct, and the boy had no permission from the company, or permission of the driver, to ride on the wagon on that or any occasion. At the trial of the case there were two patent errors which require a new trial:

1. The judge charged the jury that the plaintiff's intestate "could not be guilty of contributory negligence because under 12 years of age."

2. The case should have been nonsuited on the further ground that the defendant owed no duty to the boy, who was illegally riding on the rear of the wagon in violation of the city ordinance and standing orders of the defendant company, except that it should not injure him wantonly or willfully, which is not even suggested.

As to the first proposition: The boy jumped upon the defendant's wagon, with full legal notice that he was forbidden to do so by an ordinance of the city, and the owners had constantly forbidden any one to do so. Furthermore, the court in this case charged the jury: "If you shall find by the greater weight of the evidence in the case that the plaintiff's intestate, at the time he was killed, was under 12 years of age, then there was a *presumption of law* that the boy was incapable of so understanding and appreciating danger from the alleged negligent acts or conditions produced by others as to make him guilty of contributory negligence." A presumption of law is irrebuttable, and therefore this charge was, in effect, that if the boy was under 12 years of age he could not be guilty of contributory negligence. The decisions of the courts, without exception, are all to the contrary of this. Whether a boy of that age could be guilty of contributory negligence or not depends upon the findings of fact by the jury under proper instructions as to the capacity of the boy and the duty which the defendant owed to the boy under those circumstances. See *Jacobs v. Koehler* (N. Y., L. R. A., 1917, F. 7, and annotations thereto, pp. 10 to 164, on "Contributory Negligence of Children"—very exhaustive).

It is impossible to reconcile the charge in this case with the ruling by which the plaintiff, a younger boy, was nonsuited in *Butner v. Brown,* 182 N. C., 692 (last term), because he was held conclusively guilty of contributory negligence. In this case a boy a year older was held by the trial judge incapable of contributory negligence. In both cases a jury trial of this issue was denied, but for absolutely opposite reasons. By no process of reasoning can the two decisions be reconciled. There are probably in this State more than 50,000 milk wagons, grocery, and other store wagons, express wagons, and other vehicles employed in the discharge of similar duties. All their owners can do to prevent such accidents as this is to prohibit boys engaging in the sport from riding behind their wagons, as was done on this occasion. This prohibition was supplemented, in this instance, by the public ordinance of the city of Charlotte, of which the public are presumed to have notice. The company assumed no duty towards the boy, for it was not a common carrier. It did not injure him by any intentional act on the part of any of its employees.

If, under these circumstances, the owners of these thousands of vehicles, engaged in the necessary traffic of our streets, are to be made insurers of the safety of all boys who are injured while riding on the rear of their wagons—for it is insurance if there is a legal presumption that a boy of that age cannot be guilty of contributory negligence—then this decision will have added immensely to the liability of all persons or companies engaged in that or any similar business.

It is not too strong to say that there can be found no statute nor any decision which will justify the charge which the court gave, that a boy of that age, "as a presumption of law," could not be guilty of contributory negligence. Aside from the fact that the contrary was held in the *Butner case,* at the last term, and in numerous other cases, in *Baker v. R. R.,* 150 N. C., 562, this subject was fully discussed and it was determined by a unanimous Court as to the inquiry. "At what age must the responsibility of an infant for contributory negligence commence?" that upon all the authorities, "An infant's responsibility, so far as he is personally concerned, is held to be such care and prudence as is usual among children of the same age, and if his own act directly brings the injury upon himself, while the negligence of the defendant is only such as exposes the infant to the possibility of injury, the latter cannot recover." The Supreme Court of the United States has subsequently held the same to be sound law.

In *Wilson v. R. R.,* 66 Kansas, 118, the Court held that where a boy 12 years of age was swinging or jumping from one freight car to another and fell and was injured, he was guilty of contributory negligence as a matter of law.

In *Jollimore v. Connecticut Co.,* 86 Conn., 314, it was held that a bright boy 11 years of age, who was playing in the streets and was killed by a street car, was guilty of negligence as a matter of law.

In *Moran v. Smith,* 114 Me., 55, it was held that a child 8 years old, who attempted to run across the street in the face of an approaching automobile, and who was struck and injured, was guilty of contributory negligence.

In *Baker v. R. R.,* 150 N. C., 565, above cited, this Court, in discussing the question of contributory negligence, and whether it was a question for the court or the jury, says: "The responsibilities of infants are clearly defined by text-writers and courts. At common law, fourteen was the age of discretion in males and twelve in females. At fourteen an infant could choose a guardian and contract a valid marriage. After seven, an infant may commit a felony, although there is a presumption in his favor which may, however, be rebutted. But after fourteen an infant is held to the same responsibility for crime as an adult." And then this opinion adds almost in the same words of the later case of *Foard* *v. Power Co.*, 170 N. C., 48, as follows: "We find in the books many cases where children of various ages, from seven years upward, have been denied a recovery because of their own negligence."

In *Alexander v. Statesville*, 165 N. C., 528, it was held by *Mr. Justice Walker* that the question whether a child is guilty of contributory negligence is a question for the jury upon the evidence as to his age and capacity, and in that instance held that there, where the plaintiff was a boy seven years old, the court properly left the question of contributory negligence to the jury. To the same effect, *Raines v. R. R.*, 169 N. C., 189. But in the present case the judge relieved the jury of deciding that question by telling them that as a matter of law "a child under 12 years of age could not be guilty of contributory negligence." He lacked a month and 7 days of being 12 years old.

Secondly. Irrespective of the erroneous charge in regard to the boy under 12 being incapable of contributory negligence, this case presents the question of the responsibility of the owner of a wagon, or other ordinary vehicle in common use upon the streets, for lawful purposes to a trespasser, or bare licensee upon such vehicle.

The settled principles applicable are:

1. The plaintiff's intestate at the time of his injury, upon this evidence, was a trespasser on the defendant's wagon, and, as such, exposed himself to any risk incident to his position. The defendant did not willfully or wantonly injure him, nor was he purposely injured by the acts of its employees. As to negligence in the collision between the defendant's wagon and the street car, that was a matter between those companies, and in no wise affected the duty of the defendant to the intestate.

2. Even if the intestate had been on the wagon with the implied consent of the defendant company, he was there solely for his own pleasure and purposes, and was at most a bare licensee. He was not injured by any defect in the construction or use of the ice wagon, and there was no breach of duty towards him by the defendant company. No phase of the evidence presents any aspect of willful or wanton conduct to the plaintiff's intestate.

Thirdly. In this case, whether the defendant or the street car company was negligent in causing the collision is a matter which does not affect the liability of the defendant towards the boy.

He was forbidden to ride on the wagon by the authorities of the company and by an ordinance of the city, and did so at his own peril. No employee of the defendant company injured him, and there is an entire absence of allegation or evidence that he was willfully or wantonly injured by the defendant or any of its employees.

The plaintiff's intestate was "intelligent for his age"; was prepared to enter the fifth grade in school, showing he had advanced in the city schools year by year. The evidence is that there was no obstruction between the wagon and the oncoming car. The intestate knew necessarily the danger of a collision between the street car and the wagon. It cannot be said that a 12-year-old boy of normal intelligence did not realize the danger he assumed in jumping upon the wagon. There was no difficulty about his getting off the wagon as easily as he got on, and the only reasonable explanation of his remaining on is that he was negligent of the danger he was assuming.

Neither is this case like *Pierce v. R. R.*, 124 N. C., 83, where the boy jumped on the rear of a shifting engine and was knocked off by the fireman throwing a piece of coal at him. The deceased in this case was not injured by any act of any employee of the defendant company. Nor is it the case where the boy was attracted by a novelty as in the "attractive nuisance" cases, nor yet is it an instance where the boy was permitted to ride on the wagon by the custom or consent of the management of the defendant company. On the contrary, it is in evidence that the defendant had given the strictest orders that boys should not be so permitted to ride on their wagons, and the city of Charlotte had passed an ordinance forbidding them to do so and making it a misdemeanor. The defendant had done everything in its power to prevent the deceased committing this trespass, and to prevent boys from exposing themselves to the danger of so doing.

In Thompson on Negligence, secs. 946 and 949, discussing the question as to who are trespassers or bare licensees, says: "One entering the premises of another with his consent, but without his invitation, and not in the discharge of any public or private duty, is a bare licensee within the rules governing this branch of the law of negligence."

The fact that the plaintiff's intestate was a boy 12 years of age is not an exception to this rule. Judge Thompson says in the same work (sec. 1025): "The generally accepted rule does not impose upon the owner or occupier of premises the duty to exercise a greater degree of care in anticipation of their invasion by trespassing children. No distinction is made between trespassers as to their age. Both children and adults take the premises as they find them."

In *Peterson v. R. R.*, 143 N. C., 265, where the plaintiff went upon a railroad train at a stop for the purpose of buying fruit from the fruit vendor on the train, and was hurt by the negligent movement of the train, *Connor, J.*, declared the relation and obligation of the parties to be as follows: "When the plaintiff went into the train at the station for the sole purpose of purchasing fruit, without invitation or inducement, but simply by the silent acquiescence of defendant's agent, he was a mere permissive licensee, and took the risk incident to the moving of the train, and, in the absence of any wanton injury, the motion for nonsuit should have been allowed."

In this instance it is clear that the intestate was simply a trespasser, but if he were a licensee, *Judge Connor,* in *Peterson v. R. R.,* 143 N. C., 265, thus lays down the well established rule: "A licensee who enters upon premises by permission only, without any enticement, allurement, or inducement being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstruction or pitfalls. He goes at his own risk and enjoys the license subject to its concomitant perils."

This case is much stronger for the defendant. If it were a fact that the intestate had seen other boys riding on the steps of the ice wagon, it was not an implied permission to him to so ride. Certainly it was not an invitation or inducement. The boy was not on the step by any invitation or offer to give him ice or to take a ride. The riding on the wagon was positively against the rules of the defendant company and the driver testified, without contradiction: "My instructions, without exception, were to keep all persons off the wagon." Indeed, every driver who went upon the stand testified that he did the best he could to keep boys off. In *Briscoe v. Power Co.,* 148 N. C., 407, where the intestate was a boy 13 years of age and fell into a well of hot water not properly covered over, the Court held him to be a trespasser, or, at most, a bare licensee, and uses this expression, "If the exception is to be extended to this case, then the rule, indeed, as to trespassers must be abrogated as to children, and every owner of property must, at his peril, make his premises child-proof."

There is absolutely no evidence in this case to justify the submission of the issue of wanton or willful negligence or reckless negligence, and the court erred in refusing the request to charge the jury that there was no evidence of willful or wanton negligence on the part of the defendant.

There is no evidence in this case that the intestate had ever before ridden on the wagon, and the evidence is that all drivers tried to keep the children off the wagons, and that the instructions from the company to do this were emphatic and repeated. Besides, as already stated, the ordinance of the city of Charlotte made it a misdemeanor for any one to "ride or jump onto any vehicle without the consent of the driver thereof," or for any person to "hang on to any vehicle whatsoever." Viewing the evidence in its strongest light in favor of the plaintiff, the motion for nonsuit should have been allowed. There was no evidence of breach of duty towards the plaintiff's intestate nor was there any such negligence as would entitle the plaintiff to judgment.

In *Butner v. Brown,* 182 N. C., 692, at last term, this Court sustained a nonsuit where a boy 11 years of age was injured by the operation of an unguarded cogwheel in the defendant's mill, though the uncontradicted evidence was that the boy, and others of like age, had been permitted, without objection, for years to enter the mill at will, and that there was no notice or warning given that they should not do so, and the boy lost his arm because the defendant had not guarded the dangerous machinery, which, by the consent of the defendant's operator and its own custom, he and other boys had been permitted, without objection, to approach by visiting the mill at all times. Yet there a nonsuit was sustained, but in this case there was no defect in the machinery or car, and the intestate was not hurt thereby.

This case is one of wide and far-reaching importance. The court erred in allowing admission of testimony about a custom which had been declared (if it existed) by the city ordinance to be unlawful, and in refusing to give the defendant's prayers for instructions, and in the charge as given, and especially in refusing to allow the defendant's motion for nonsuit upon the ground that upon the evidence the intestate, because under 12 years of age, "could not be guilty of contributory negligence."

On a careful perusal of the record, it is a reasonable inference that the question really tried by the jury was solely whether the defendant ice company or the street car company was proximately liable for the collision, leaving out the real issue whether the ice company, in either event, was liable to the plaintiff's intestate, who was a trespasser, and, besides, was guilty, upon the plaintiff's own showing, of contributory negligence in violating the town ordinance and the prohibition of the defendant company.

BOARD OF EDUCATION OF JOHNSTON COUNTY v. BOARD OF COMMISSIONERS OF JOHNSTON COUNTY.

(Filed 12 April, 1922.)

1. **Constitutional Law—Statutes—Retroactive Laws—Vested Rights—Curative Statutes.**

   Where a statute is void only because of a neglected omission of formal constitutional requirements, and is of a subject-matter within its authority, the observation of these requirements in a later act amending the first one cures the defect therein and gives validity thereto, in the absence of intervening rights to the contrary.

2. **Same—Schools—Bonds—County Commissioners.**

   In a suit by the commissioners of a school district within a county under the provisions of C. S., 5681, to compel the county commissioners to deliver to it certain school bonds for negotiation that the voters of the district had approved at an election held according to the statutory provisions affecting them, it appeared that the issue was in the sum of $75,000, or $50,000 in excess of the amount authorized by C. S., 5678, and that the original act had not been passed in accordance with the requirement of our Constitution, Art. II, sec. 14, but was later ratified by the Legislature in conformity therewith. There being no intervening vested rights: *Held,* the former infirmity of the bonds was cured by the later act, and a judgment in favor of the plaintiffs was a proper one.

APPEAL by defendants from *Calvert, J.,* at March Term, 1922, of JOHNSTON.

Controversy without action, submitted upon an agreed statement of facts, to ascertain and determine the validity of certain school bonds, authorized by the voters of Four Oaks School District in Johnston County.

From a judgment sustaining the validity of said bonds and directing that they be delivered as required by C. S., 5681, the defendants appealed. The essential facts are stated in the opinion.

H. B. Marrow for plaintiff.
J. A. Narron for defendants.

STACY, J. On 12 April, 1921, a majority of the qualified voters of Four Oaks School District, known as Ingrams, No. 8, situated in Johnston County, in an election duly called, under article 39, chapter 95, of the Consolidated Statutes, and amendatory act thereto, chapter 91, Public Laws, extra session 1920, authorized the board of county commissioners of said county to issue bonds not to exceed in amount the sum of $75,000, for the purpose of building, rebuilding, and repairing the schoolhouses of said district and furnishing the same with suitable equipment. C. S., 5676. The validity of said bonds, having been called in question, this proceeding is brought to ascertain and determine their legal status.

It is conceded that chapter 91, Public Laws, extra session 1920, was not passed in accordance with the requirements of Article II, section 14, of the Constitution, and is therefore invalid. It is further conceded that under C. S., 5678, the amount of bonds for any township or school district, authorized by an election, such as the instant one, may not exceed the sum of $25,000. But it is contended that the Legislature, on 19 December, at its extra session 1921, passed an act conforming in all respects to the requirements of Article II, section 14, of the Constitution, specifically ratifying and confirming the results of the election in question, and validating the issuance of the said bonds up to the amount of $75,000.

The only question presented for consideration is whether the bonds, in excess of $25,000 and up to $75,000, could be validated by the curative act of the special session of 1921. It is conceded that the election in all respects was regular, and that a majority of the qualified voters cast their ballots in favor of issuing the bonds, not only for the maximum amount allowed under C. S., 5678 (the validity of which is incontestable), but also for the full amount authorized and voted upon under color of chapter 91, Public Laws, extra session 1920.

The original power of the Legislature to pass the amendatory act of 1920 is admitted, and, as now advised, we see no valid reason why the law-making body could not ratify and confirm that which it had the power to authorize in the first instance, and which power it actually did attempt to exercise. Subject to certain exceptions, the general rule is that the Legislature may validate retrospectively any proceeding which it might have authorized in advance. *Anderson v. Wilkins,* 142 N. C., 157; *Lowe v. Harris,* 112 N. C., 472; Cooley on Const. Lim. (7 ed.), 531; 6 A. & E. (2 ed.), 940; *Sechrist v. Comrs.,* 181 N. C., 514. "The Legislature may ratify and confirm any act which it might lawfully have authorized in the first instance, where the defect arises out of the neglect of some legal formality and the curative act interferes with no vested rights." *Steger v. Building Asso.,* 208 Ill., 236.

Where the Legislature has undertaken to pass a law, clearly within its power to enact, and by reason of some defect in its passage the statute is rendered ineffectual, we see no reason why the Legislature, in the absence of any opposite intervening rights, could not, by subsequent enactment, ratify and confirm the results of such proceedings as in good faith have been taken and had under the prior defective act. This is the prevailing rule, and it seems to be in accord with the general trend of authorities on the subject. *Anderson v. Wilkins, supra,* and cases there cited. *Belo v. Comrs.,* 76 N. C., 497; 12 C. J., 1094; 6 R. C. L., 321.

Speaking to a similar question in *Thompson v. Lee County* (Iowa), 3 Wall., 327, it was said by the Supreme Court of the United States: "If the Legislature possessed the power to authorize the act to be done, it could, by retrospective act, cure the evils which existed, because the power thus conferred had been irregularly executed. The question with the Legislature was one of policy, and the determination reached by it was conclusive." See, also, *Erskine v. Nelson County* (N. Dak.), 27 L. R. A., 696, and note.

Again, in *Grenada County Supervisors v. Brown,* 112 U. S., 261, it was held that a municipal subscription to the stock of a railroad company, in aid of the construction of said road, made as a result of an election, called without proper authority previously conferred, might be confirmed and legalized by subsequent legislative enactment, unless such legislation were prohibited by the Constitution of the State, and when that which was done would have been legal had it been done under legislative sanction previously given. *Mr. Justice Harlan,* speaking for the Court, said: "Since what was done in this case by the constitutional majority of qualified electors, and by the board of supervisors of the county, would have been legal and binding upon the county had it been done under legislative authority, previously conferred, it is not perceived why subsequent legislative ratification is not, in the absence of constitutional restrictions on such legislation, equivalent to original authority." And to like effect is the decision in *Hayes v. Holly Springs,* 114 U. S., 120.

Under the foregoing principles, we think the judgment of his Honor sustaining the validity of the bonds in question should be upheld.

Affirmed.

ACME MANUFACTURING COMPANY v. TUCKER & NOBLES AND DIRECTOR GENERAL OF RAILROADS.

(Filed 12 April, 1922.)

1. **Carriers of Goods—Railroads—Failure to Deliver—Burden of Proof—Nondelivery Station.**

Where a shipment of goods is delivered to a railroad company for transportation, the title vests in the consignee, with the duty resting upon the carrier on the arrival of the goods at destination to notify the consignee and make delivery or show legal excuse for its default. C. S., 3516. And this principle applies to a side-station when notification of arrival should have been given from a nearby station, and the inquiring consignee was there misinformed as to the arrival, and the car in the meanwhile was broken into and the shipment stolen.

2. **Same—Verdict—Judgments.**

Where it is established by the jury that a consignment of goods was carried to the delivering point by the carrier, its failure to deliver to the consignee, or to notify him, and the goods are lost while in its possession, the verdict is incomplete when there was no issue submitted as to whether the carrier, who is a party to the action, was in default in not delivering it to the consignee, and a judgment thereon against the consignee is reversible error, entitling the consignee to a new trial.

3. **Judgments—Statutes—Carriers of Goods—Railroads—Actions—Consignor and Consignee—Director General—Parties.**

Where the consignor brings action against the consignee for the purchase price of a shipment by common carrier, while the railroad was under control of the Federal Director, and the defense is that it had not been delivered, it was proper to make the Director General a party to the action; and in case the shipment had been lost through the carrier's default, a judgment against the carrier is the proper one. C. S., 602.

STACY, J., dissenting.

APPEAL by plaintiff from *Kerr, J.,* at March Term, 1921, of NEW HANOVER.

This action was brought to recover the value of a carload of fertilizer shipped by plaintiff from Acme, N. C., on the Atlantic Coast Line Railroad to defendants Tucker & Nobles, at Munford Siding—a blind siding—or nonagency station of the Atlantic Coast Line Railroad, two miles north of Greenville, N. C., and operated under the control of the Atlantic Coast Line Railroad agency at Greenville.

There is uncontradicted evidence that this carload of fertilizer came to Greenville and was forwarded thence to Munford Siding, but that it was never received by Tucker & Nobles, some one having opened the car and removed the contents, and that there has been a trial therefor before the Federal Court at Wilson. On motion of the defendants, Tucker & Nobles, the Atlantic Coast Line Railroad Company and the Director General of Railroads were made party defendants, and the railroad company answered, placing responsibility, if any, upon the Director General, who through the same counsel as the railroad company admitted the receipt of Soo Line Car No. 36,986, in which this carload of fertilizer was transported, but denied any liability for failure to deliver the same.

The plaintiff admitted that by inadvertence they notified Tucker & Nobles that the fertilizer had been shipped in "Soo Line Car No. 30,986," whereas in truth it was shipped in "Soo Line Car No. 36,986." There was much evidence on the trial in regard to this inadvertence and mistake in the notice sent by the plaintiff to Tucker & Nobles.

The jury responded to the issues submitted that the plaintiff shipped over the Atlantic Coast Line Railroad the 30 tons of fertilizer in Soo Car No. 36,986, consigned to Tucker & Nobles at Munford Siding, but that the defendants Tucker & Nobles never received said fertilizer, and that the value of the same was $1,707. The evidence was uncontradicted that the consignees, Tucker & Nobles, inquired of the railroad agent at Greenville frequently if a carload of fertilizer had been shipped to them at that point, and the agent replied that it had not been received there, and there was evidence that the carload was later placed at Munford Siding, but that no notice was given to the consignee by the carrier or its agent at Greenville, and the agent himself so testified, although it was the habit of the carrier to give such at that siding; that the car was broken open by parties unknown, and the contents were never delivered to Tucker & Nobles. Judgment was entered against the plaintiff, who appealed.

J. G. McCormick and J. Bayard Clark for plaintiffs.

F. G. James & Sons and Wright & Stevens for defendants.

Rountree & Carr for Atlantic Coast Line Railroad Company and Director General.

CLARK, C. J. It being admitted by all parties to this action that, according to the way-bill, the bill of lading, and the wheel report, as well as a matter of fact, the carload of fertilizer in question was loaded into and transported over the Atlantic Coast Line Railroad in Soo Car No. 36,986, the title at once passed, when it was so loaded, to the defendants Tucker & Nobles, the consignees, and the burden then devolved upon the carrier represented by the Director General to show a delivery thereof to Tucker & Nobles, or that failure to deliver the same was not by default of the carrier. The verdict of the jury determined that the said carload, which had been transported in Soo Car No. 36,986, consigned to Tucker & Nobles at Munford Siding, was delivered by the railroad at said siding, but that said carload was never delivered to Tucker & Nobles, and that the value thereof was $1,707.

The other finding, as to the plaintiff having erroneously notified Tucker & Nobles that the shipment had been made in Soo Car No. 30,986, seems to have been much debated at the trial, and the issue as to that matter established the fact of this inadvertency, but we cannot see that it was very relevant or at all material.

In *Mitchell v. R. R., ante,* 162, it was held by *Hoke, J.,* that under Revisal, 2632, as amended by chapter 461, Laws 1907, which, as amended, is now C. S., 3516, it is incumbent upon the common carrier of freight not only to ship the goods promptly, but it is negligence on the part of the carrier not to make delivery at destination within the time limited by the statute, which is not complied with "until the goods are in the company's warehouse (or at destination) and notice duly given." The railroad agent at Greenville testified that no notice of the arrival of the shipment was given to Tucker & Nobles, and the testimony that they frequently inquired for it is uncontradicted.

The carrier having received this shipment, consigned to Tucker & Nobles at Munford Siding, the title thereupon to the goods passed to the consignees, and the duty devolved upon the carrier to notify the consignees upon the arrival of the shipment and to make delivery. *Poythress v. R. R.,* 148 N. C., 390; *Bank v. R. R.,* 153 N. C., 351.

It was eminently proper, and indeed essential, to the disposition of the questions involved that the Director General should be made a party defendant.

The trial was incomplete, because the issues submitted did not decide the material matters necessary for a final judgment to determine the ultimate rights of the parties on each side as between themselves. Issues 1 and 3 were as to whether the plaintiff notified the consignees correctly as to the number of car, and number 4, whether the plaintiff corrected this error. In response to issue number 2, the jury found that the plaintiff shipped over the Atlantic Coast Line Railroad this 30 tons of fertilizer, consigned to Tucker & Nobles at Munford Siding, and that it was delivered by the railroad at said siding. In response to issue 5, the jury found that the defendants Tucker & Nobles did not receive the car of fertilizer shipped by the plaintiff to them; and in response to issue number 6 the jury found that the value of the said carload of fertilizer was $1,707.

The matters found on 2, 5, and 6 issues were not controverted by any evidence, and, in fact, were admitted by all parties. The real issue was as to whether the failure of the carrier to deliver was without default on its part. The case should go back for this additional finding of fact, and if found against the Director General, judgment should be entered in favor of the plaintiff and against the Director General. It would be superfluous to render judgment in favor of the plaintiff against the consignees with judgment over against the Director General.

In the language of the statute, C. S., 602, the judgment should "determine the ultimate rights of the parties on each side as between themselves"; and as held in *Corp. Com. v. R. R.*, 137 N. C., 1: "Judgment should be entered on the material issues without regard to the immaterial issues."

The evidence in this case upon the record shows no default on the part of the consignees, and no excuse for the failure of the carrier to notify the consignees and to deliver the shipment to them, but they should have opportunity now to produce such evidence, and the verdict should distinctly adjust the responsibility for the failure to deliver the goods.

New trial.

STACY, J., dissents.

LANE & COMPANY v. CENTRAL ENGINEERING COMPANY AND CITY OF BURLINGTON, NORTH CAROLINA.

(Filed 12 April, 1922.)

1. **Contracts, Written—Subsequent Agreement—Parol Evidence—Judgments.**

The defendant contractor, under a written contract with its codefendant city, agreed to construct certain streets, and with the plaintiff, that the latter furnish crushed stone therefor in accordance with written specifications furnished: *Held*, it was competent to show that, subsequently, by parol, the defendants changed the specifications for the stones to a higher-priced quality, which the contractor agreed to pay the plaintiff; and under the facts as ascertained by the verdict, a judgment requiring the city to pay to the plaintiff the amount due to the contractor, less the amount of its counterclaim, by a credit upon the judgment against the contractor, was proper.

2. **Principal and Agent—Contracts—Promise of Agent—Benefits Received—Estoppel.**

The foreign principal is answerable for the promise of its superintendent in charge of local construction, to pay an additional price to a material furnisher for a change in material from that originally specified, and is estopped by receiving the benefit to deny the validity of such promise.

3. **Issues—Appeal and Error.**

Issues are sufficient which present every phase of the questions in controversy. *Powell v. Lumber Co.*, 168 N. C., 632, cited and applied.

APPEAL by defendants from *Daniels, J.*, at September Term, 1921, of ALAMANCE.

In 1917 the city of Burlington contracted with its codefendant, the engineering company, to build certain streets, and the latter company contracted with the plaintiff to furnish the stone for that purpose, the stone to be furnished according to plans and specifications of the city, which were made part of the contract between them. Thereafter the defendant engineering company agreed with the city for certain changes in the contract which necessitated changes in the stone to be furnished by plaintiff, and the plaintiff alleges that such changes were made with the understanding and agreement that the plaintiff was to receive additional compensation for the extra expense of furnishing different-sized stone from that specified in the original contract. The plaintiff further alleged that the city of Burlington allowed the defendant engineering company additional compensation because of such changes in the contract, and that the plaintiff notified the city of Burlington of its claim against the engineering company before the city settled with the engineering company, and that because of such changes there was due the plaintiff the sum of $2,965.51. Both the defendants answered and denied the allegations of the plaintiff in regard to the changes in the contract, and in regard to the promise to pay additional therefor, and the engineering company went further and set up a counterclaim in the sum of $300 and interest against the plaintiff because the engineering company had to go into the open market and buy stone, which the plaintiff was to furnish, on an occasion when the plaintiff's plant broke down, for which it had to pay an increased price of $300.

The jury found, on the issues submitted, that the Central Engineering Company was indebted to the plaintiff in the full amount claimed, $2,965.51, for which the court entered judgment, deducting the counterclaim of $300, and it appearing that the sum in the hands of the city of Burlington still due and unpaid to the engineering company amounted to $2,413.50, on motion of the plaintiff, and with the assent of the city of Burlington, judgment was entered that said sum of $2,413.50 be paid by the city, to be credited upon the amount above adjudged due the plaintiff by the defendant engineering company.

Parker & Long for plaintiff.
Carroll & Carroll for defendants.

CLARK, C. J. This cause was ably argued upon both sides, but we think that the matters in controversy were almost entirely for the consideration of the jury, who have found the facts in accordance with the contention of the plaintiff, and that judgment was properly entered against the engineering company for the full amount claimed by plaintiff, subject to the counterclaim of $300.

The defendant engineering company claimed that there was not sufficient allegation of a change in the contract, and that the evidence concerning such changes was incompetent because they varied a written contract. We think, however, the allegations are clearly stated and the decisions are settled that the change varying a written contract was competent, as it was made subsequent to the original contract. *Freeman v. Bell,* 150 N. C., 148; *Mfg. Co. v. McPhail,* 181 N. C., 208.

Bishop, who represented the defendant engineering company in requesting the change of the stone to a smaller size, stated that the plaintiff would be reimbursed for the extra expense incurred. He was superintendent in charge of the work in Burlington on behalf of the company. The company accepted the work, and is chargeable for the value of the same, even if there was no express promise. It is estopped by receiving benefit under the change in the contract to deny its validity and the company's liability therefor.

The city of Burlington having admitted that it had in hand $2,413.50 balance due the engineering company for the work done and submitted its readiness to pay this amount in its hands to the person determined by the verdict, judgment was properly rendered that the city pay over that amount to the plaintiff, to be credited upon the judgment rendered against the engineering company.

We think the issue submitted was sufficient to present every phase of the questions in controversy, which, indeed, have been practically passed upon in *Powell v. Lumber Co.*, 168 N. C., 632, and need not be repeated in this opinion.

No error.

LEROY HEDGEPETH, BY HIS NEXT FRIEND, G. W. HEDGEPETH, v. H. G. COLEMAN.

(Filed 12 April, 1922.)

1. **Libel—Slander—Actionable Per Se—Damages.**

Everything printed or written which reflects on the character of another and is published without lawful justification or excuse, is a libel, whatever the intention of the writer may have been, and many charges which if merely spoken of another would not be actionable without proof of special damages may be libelous *per se* when written or printed and published, although such charges may not impute the commission of a crime.

2. **Evidence—Typewritten Letters—Libel.**

Where the plaintiff, in his action for libel, has found in his mail box an anonymous typewritten letter, addressed to him, and the defendant has admitted that "he was knowing to it," the opinion of an expert in such matters that the anonymous letter, from certain characteristics of type, punctuation, spacing between lines, and from the general form of the letters, was the same writing, by comparison, as one the defendant admits to be genuine, and evidently written on his machine, is competent as tending to show the defendant's responsibility for the libelous typewritten letter.

3. **Libel — Communication— Third Persons—Actions—Damages—Causal Connection.**

While the defamatory words of a libelous letter must be communicated to another than the one to whom the defamatory words were written, to be actionable, it is sufficient if the defendant had communicated them to only one other person, or if, under the circumstances and the existing conditions, the defendant must have intended, or had reason to suppose, that the person addressed would do so, and the damage complained of was occasioned by the act, in the relation of effect and cause.

4. **Same—Minors—Duress.**

Where a libelous letter is addressed to a boy of between fourteen and fifteen years of age, it may operate so powerfully upon his immature mind as to amount to a coercion, and his communicating it to his near relation under such circumstances need not be conclusively considered as his voluntary act.

5. Same—Parent and Child—Questions for Jury—Trials.

In an action for libel, where the evidence tends to show that the defendant was responsible for a libelous letter to a boy between fourteen and fifteen years of age, charging him, without legal excuse, of larceny, and threatening prosecution and imprisonment if he did not return the stolen goods, and had good reason to believe that the boy would naturally show the letter to others through fear or for counsel and advice, it raised a question for the jury to determine whether the defendant must have foreseen the exposure of the letter as the natural and probable result of the libel.

6. Evidence — Experts — Opinions — Instructions— Appeal and Error—Weight of Evidence.

Where experts in typewriting have, upon competent evidence, testified to their opinion that a libelous letter, the subject of the suit, was written by the defendant, the refusal of the trial judge to charge the jury that they should "scan with care the evidence of the expert before arriving at a conclusion that defendant wrote the letter complained of," is not error, testimony of this character falling within the general rule that expert testimony is subject to the same tests that are ordinarily applied to the evidence of other witnesses. *Buxly v. Buxton*, 92 N. C., 479, cited and distinguished.

APPEAL by defendant from *Devin, J.*, at the November Term, 1921, of GRANVILLE.

The defendant was a merchant, depot and express agent, and postmaster at Lyon. In February, 1918, his storehouse and safe were broken into; and soon thereafter the plaintiff, a boy then between fourteen and fifteen years of age, found in his individual mail box the following paper-writing, sealed in an envelope addressed to him:

WASHINGTON, D. C.

READ ALL THIS:

We saw you next day after it happened. You showed guilt, but we wanted more evidence. We have plenty of it now, and would come right on and get you, but on account of your age, and for the sake of your relatives, we will give you one chance to make good by taking everything you got, tie it up and throw it into cat-hole of shed room door. If he finds it before next Sunday he will let us know, but unless it is found by Sunday we will come and get you, and there will be no more chance to stop it this side of Atlanta pen.

If it is found, no one will know that you put it there, and you may not be suspected by everybody, but if we come back, then it matters not who knows it, for we will push it clear through, and do it quickly.

Two men, who saw you one Wednesday.

The plaintiff showed this paper to W. T. Hedgepeth, his brother, and to T. M. Parrott, and his brother showed it to plaintiff's father. The communication received by the plaintiff was typewritten. An expert witness compared it with a typewritten letter received from the defendant, and testified that in his opinion each paper was written on an Oliver typewriter, number four or five. He said: "The type is the same, and the general appearance is the same; the body of each letter is written in single space; it is double-spaced between paragraphs; the marginal indentation starts immediately after the salutation in each letter; and the paragraphs down through the letter follow that beginning point; the spacing after the comma and before the next letter is the same; the letters E, A, C, D, and B, and the small letter s and the capital S and the period on each letter are out of alignment; the letter E is clogged at the top—not plain; also the letters T and W and the letter U are clogged and not plain; periods after the letter C and after the letter E in each letter; in each of these letters the letter C is struck out of place—the same impression and the same clearness; the margins on the right-hand side are similar; the periods and the dash are struck with such force as to leave an indentation on the back of each letter and the comma is distinct—that is, the period and the tail are distinct in each letter; the spacing after the comma is the same. These are some of the main characteristics in these two letters. That the style of the type is the same and the space between each written line, that is, from the bottom of the first line to the top of the second line, is the same. From these similarities pointed out he formed his opinion that they were written by the same person and on the same machine."

After reading the paper received by plaintiff, W. T. Hedgepeth showed it to the defendant, who denied writing it, but said that "he was knowing to it"; that efforts were being made to locate the person who had broken into the store; and that the matter was in the hands of a detective. Defendant told plaintiff's father that he would be wonderfully surprised when he found out who had broken into the store; that if the person who did so would bring back all he had and put it in the cat-hole of the shed room his name would not be exposed.

The defendant introduced no evidence. At the close of the evidence the defendant moved to dismiss as in case of nonsuit. Motion allowed as to the alleged slander and blackmail, and denied as to the alleged libel. Defendant excepted and appealed.

John W. Hester and D. G. Brummitt for plaintiff.
Royster & Royster and A. W. Graham & Son for defendant.

ADAMS, J. In *O'Brien v. Clement,* 15 M. & W., 435, *Parke, J.,* said: "Everything, printed or written, which reflects on the character of another, and is published without lawful justification or excuse, is a libel, whatever the intention may have been." Many charges, which if merely spoken of another would not be actionable without proof of special damages, may be libelous *per se* when written or printed and published, although such charges may not impute the commission of a crime. *Simmons v. Morse,* 51 N. C., 6; *Brown v. Lumber Co.,* 167 N. C., 11; *Hall v. Hall,* 179 N. C., 571; *Paul v. Auction Co.,* 181 N. C., 1.

In the case before us, however, the anonymous communication appears to charge the plaintiff with an offense punishable by confinement in a Federal prison; and while the defendant does not deny that it is libelous *per se,* he controverts, chiefly on two grounds, the plaintiff's right to recover damages. These grounds are: (1) that the defendant did not write the paper referred to; and (2) that even if he did there has been no publication of it in contemplation of law.

As to the first, the defendant admitted that while he did not write the communication "he was knowing to it"; and there was expert evidence tending to show that this paper and a letter, the authenticity of which the defendant did not dispute, were written by the same person on an Oliver typewriter. This was not mere vague, uncertain, and irrelevant matter, but it was evidence of a character sufficiently substantial to warrant the jury in finding as a fact that the defendant was responsible for this typewritten paper of unavowed authorship.

As to the second ground of defense, the general rule unquestionably requires that the defamatory words be communicated to some one other than the person defamed. Folkard's Starkie on Slan. and Lib., 37; Newell's Def., Lib. and Slan., 227; *Shepard v. Lamplier,* 146 N. Y. S., 745; *Enright v. Bringgold,* 179 Pac., 844; *Howard v. Wilson,* 192 S. W., 474; *Traylor v. White,* 170 S. W., 412; *Walker v. White,* 178 S. W., 254. "The publication of a slander involves only one act by the defendant; he must speak the words so that some third person hears and understands them. But the publication of a libel is a more composite act. First, the defendant must compose and write the libel; next, he must hand what he has written, or cause it to be delivered, to some third person; then that third person must read and understand its contents; or, it may be that after composing and writing it, the defendant reads it aloud to some third person, who listens to the words and understands them: in this case the same act may be both the uttering of a slander and the publication of a libel." Odgers on Lib. and Slan., 157. But it is not necessary that the defamatory words be communicated to the public generally, or even to a considerable number. It is sufficient if they be communicated only to a single person other than the person defamed. *Jozsa v. Maroney,* 27 L. R. A. (N. S.), 1041; *Adams v. Lawson,* 94 Am. Dec., 455. For example, it has been held that the publication was sufficient where the defendant had communicated the defamatory matter to the plaintiff's agent or attorney; or had read it to a friend before posting it to the plaintiff; or had procured it to be copied, or sealed in the form of a letter addressed to the plaintiff and left in the house of a neighbor, by whom it was read; or had caused it to be delivered to and read by a member of the plaintiff's family. The fact, therefore, that the paper under consideration may have been seen only by the plaintiff's brother and Parrott cannot exonerate the defendant on the ground that there was no communication to the public. *Tuson v. Evans,* 12 A. & E., 733; *Snyder v. Andrews,* 6 Barbour (N. Y.), 43; *Keene v. Ruff,* 1 Clarke (Iowa), 482; *Swindle v. State,* 21 Am. Dec., 515; Odgers, *supra,* 161; *Brown v. Lumber Co.,* 167 N. C., 9. But the defendant argued that even if this be granted, still there was no publication by him because the paper was communicated directly to the plaintiff, and the plaintiff alone divulged its contents.

We have stated the general rule to be that the communication of libelous matter to the person defamed does not of itself constitute a publication. The defendant's argument involves the question whether the rule is inflexible or whether it is subject to exception or qualification. The suggestion that as a principle it is immutable cannot be adopted. The ultimate concern is the relation that existed between the writing of the paper and the disclosure of its contents by the plaintiff. For running through the entire law of tort is the principle that a causal relation must exist between the damage complained of and the act which occasions the damage. Unless such relation exists, the damage is held to be remote, and cannot be recovered; but if such relation does exist, the wrongful act is held to be the cause of the damage. So in this case we cannot disregard the relation of cause and effect. "There is no publication such as to give rise to a civil action where libelous matter is sent to the person libeled, unless the sender intends or has reason to suppose that the matter will reach third persons (which in fact happens), or such result naturally flows from the sending." Street's Found. Leg. Liab., vol. 1, 296. Under this principle the mailing of a libelous letter to a person whose clerk, in pursuance of a custom known to the sender, opens and first reads the letter constitutes a publication. *Delacroix v. Thevenot,* 2 Starkie, 63; *Pullman v. Hill,* 1 Q. B., 524; *Runney v. Worthley,* 186 Mass., 144. Whether the principle extends to a disclosure by the person libeled is to be determined by the causal relation existing between the libel and the publication. The sending of libelous matter to a person known by the sender to be blind, or, having sight, to be unable to read, and therefore obliged to have it read by another, is, when read, a publication by the sender, because such exposure of the subject-matter is the proximate result of the writing and sending of the communication. *Allen v. Wortham,* 89 Ky., 485; *Wilcox v. Moon,* 64 Vt., 450. These exceptions are based upon the principle that the act of disclosure arises from necessity. But necessity is not predicated exclusively of conditions which are physical. Necessity may be superinduced by a fear which is akin to duress. A threat may operate so powerfully upon the mind of an immature boy as to amount to coercion; and when an act is done through coercion it is not voluntary.

In the letter referred to there is a threat of prosecution and imprisonment. When it was received the plaintiff was between fourteen and fifteen years of age, and his youth was known to the defendant. With knowledge of the plaintiff's immaturity, of the character of the accusation and menace contained in the letter, of the probable emotion of fear, and the impelling desire for advice on the part of the plaintiff, the defendant must have foreseen the plaintiff's necessary exposure of the letter as the natural and probable result of the libel. Indeed, under the charge of his Honor, the jury found from the evidence that the defendant had reasonable ground to know that the letter would necessarily be seen by third persons. Obviously, then, the act of the defendant was the proximate cause of the publication. *Fonville v. McNease,* 31 Am. Dec., 556; *Miller v. Butler,* 52 Am. Dec., 768; *Pollard v. Batchelder,* 5 So., 695. This conclusion disallows all the exceptions relating to the motion for nonsuit, and to the defendant's prayer for peremptory instructions.

The defendant excepted to his Honor's refusal to give the jury this instruction: "That owing to the large number of typewriters of different kinds and makes now in use, and the similarity in styles of typewriting in the various schools, the jury should scan with care the evidence of the expert before arriving at a conclusion that defendant wrote the letter complained of."

The defendant relies on *Buxly v. Buxton,* 92 N. C., 479. There the issue was whether the bond sued on had been executed by the defendant's intestate. The plaintiff introduced evidence of the intestate's admission that he had signed the note, and each party introduced expert evidence relating to the alleged signature. The trial judge instructed the jury that evidence of the intestate's admission, if accepted as true, was entitled to greater weight than the expression of opinion by expert witnesses, and that an opinion as to handwriting should be received with caution. On appeal, it was held that an exception to this instruction was untenable; but it may be remarked that the learned justice who wrote the opinion was contrasting the relative value of positive with opinion evidence, and pertinently said that there "could be no harm in making the observation in regard to these classes of evidence and their relation to the controversy." But he did not say that refusal to give the instruction would have constituted reversible error. We should hesitate to hold that there may not be cases in which it would be proper for the court to tell the jury that expert testimony should be received with caution; and we should be equally reluctant to pronounce such instruction an inflexible necessity. As the testimony of an expert ought neither to be blindly accepted nor arbitrarily rejected, so the question whether it is to be considered like other evidence or received with caution may depend upon the circumstances developed in the trial. But, generally speaking, expert testimony should be subject to the tests that are ordinarily applied to the evidence of other witnesses, and to the court's instruction that the jury must find the facts upon their own sound judgment. *R. R. v. Thurl,* 49 Am. Rep., 484; *Carter v. Baker,* 1 Sawyer, 512, 525; *Ezzers v. Eggers,* 57 In., 461; *Cuneo v. Bessoni,* 63 In., 524; *U. S. v. Pendergast,* 32 Fed., 198; *Madden v. Coal Co.,* 111 N. W., 57, 60; *Ryder v. State,* 100 Ga., 528; *Burney v. Torrey,* 100 Ala., 157. We find nothing in the record which removes the evidence referred to from the operation of the general principle, and for this reason exception seven is overruled.

The exceptions disposed of are those which were chiefly relied on in the argument. We have not overlooked the others, but have given them due consideration; and, having regard to the evidence and the charge, we have concluded that they cannot be sustained. Upon a careful review of the entire record we find no sufficient cause for disturbing the result of the trial.

No error.

REBECCA GOODLOE v. THE FIDELITY BANK.

(Filed 12 April, 1922.)

Banks and Banking—Deposits—Checks—Principal and Agent—Signature.

Upon the plaintiff sending money for deposit in the bank by W., the bank opened an account in the plaintiff's name and issued its pass book to her, and agreed, without the knowledge or consent of the plaintiff, that the checks should be signed in the plaintiff's name by W., and on these checks, so written and signed, the money was withdrawn from the bank to the plaintiff's loss: *Held,* there being neither express nor implied authority given by the plaintiff to W., to check out the money, as stated, the defendant bank is liable to the plaintiff for her loss.

APPEAL by plaintiff from *Kerr, J.,* at the January Term, 1922, of DURHAM.

Civil action to recover $143, money deposited in the defendant bank by agent of plaintiff, and alleged to have been paid out on checks unauthorized by depositor.

From a judgment in favor of defendant the plaintiff appealed.

R. O. Everett for plaintiff.
Fuller, Reade & Fuller for defendant.

STACY, J. This was an action, commenced in the court of a justice of the peace, and tried *de novo* on appeal to the Superior Court of Durham County. In the latter court the parties waived a jury trial and submitted the case to his Honor for determination on an agreed statement of facts, the material parts of which were as follows:

On 16 August, 1917, Rebecca Goodloe had Eugene Weaver to deposit to her credit in the Fidelity Bank the sum of $143. No part of said sum was ever drawn out by the plaintiff, and she at no time gave authority to any one to withdraw the same.

When Eugene Weaver deposited said money in the bank he had an agreement with the teller that he might check the deposit out by signing the checks: "Rebba Goodloe, per Eugene Weaver." The passbook was made out in the name of Rebecca Goodloe, and the account stood in her name on the books of the bank.

Eugene Weaver was permitted by the defendant to draw out said account, and he had the passbook in his possession at the time of his death in 1921. The defendant permitted this to be done without authority from the plaintiff and without her knowledge or consent.

The defendant bank had no direct dealings or communication with Rebecca Goodloe at any time prior to the death of Eugene Weaver; and the defendant was never notified by her not to pay said money to Weaver.

Upon these, the facts chiefly relevant, we think his Honor should have rendered judgment in favor of the plaintiff. The actual or implied authority of Weaver to withdraw said deposit (*Heath v. Trust Co.*, 69 N. E., 215) is specifically negatived by the facts agreed; hence, we are driven to the conclusion that the defendant has paid out the plaintiff's money wrongfully and without authority. 2 C. J., 664; 7 C. J., 641; 3 R. C. L., 546.

"A bank receives the depositor's funds upon the implied condition of disbursing them according to his order, and upon an accounting is liable for all such sums deposited, as it has paid away without receiving valid directions therefor." *Crawford v. Bank*, 100 N. Y., 50. Again, in *Hall v. Fuller*, 5 B. & C., 750, *Bailey, J.*, speaking for the Court, said: "If the banker unfortunately pay money belonging to the customer upon an order not genuine he must suffer, and to justify the payment he must show that the order was genuine, not in the signature only, but in every respect."

Applying these principles to the facts in hand, we think the plaintiff is entitled to recover. This will be certified to the Superior Court, to the end that judgment may be entered for the plaintiff on the agreed statement of facts.

Reversed.

R. D. CRAVER v. DURHAM HOTEL CORPORATION.

(Filed 12 April, 1922.)

Easements—Alleyways—Common Source—Evidence—Chain of Title—Prima Facie Case—Nonsuit—Trials.

Where the plaintiff claims an easement in an alley along the edge of the defendant's adjoining lands, and relies upon a paper chain of title from a common source, without possession, and fails to connect himself therewith, he fails to make out a *prima facie* case, and a judgment as of nonsuit upon the evidence is properly rendered. *Semble*, in the instant case, no rights have been lost by mere nonuser or failure to open the alleyway.

APPEAL by plaintiff from *Kerr, J.*, at January Term, 1922, of DURHAM.

Civil action to establish plaintiff's alleged claim and right of easement to a 10-foot alley running across and over the defendant's land.

This appeal is prosecuted from a judgment as of nonsuit, entered at the close of plaintiff's evidence.

McLendon & Hedrick for plaintiff.
R. O. Everett and Fuller, Reade & Fuller for defendant.

STACY, J. Plaintiff and defendant are adjacent landowners of several lots situate in the city of Durham, N. C., and plaintiff claims an easement, or perpetual right of user, in, to, and over an alleyway, ten feet wide and 65 feet in length, lying along the edge of defendant's property and adjoining one of the plaintiff's lots. .

There was evidence tending to show that the defendant's land, as well as that claimed by the plaintiff, was originally owned by Martha Mangum. Plaintiff then undertook to establish his title, including the alleged easement in question, by offering *mesne* conveyances tending to connect his claim with the original title of Martha Mangum, defendant's predecessor in title and the common grantor of both parties. Plaintiff introduced a deed from Martha Mangum and husband to Rufus Massey, but it does not sufficiently appear in the evidence that Rufus Massey ever conveyed the land to any one, or that any of the persons under whom the plaintiff now claims derived title from said Rufus Massey by descent or otherwise. There has been no actual possession of the strip of land in controversy. Hence, upon the record plaintiff has failed to make out a *prima facie* case. *Mobley v. Griffin,* 104 N. C., 113.

While this break in the plaintiff's chain of title would seem to be fatal, unless it can be cured, yet it does not appear from the instant record that any rights have been lost by mere nonuser or failure to open said alleyway. 9 R. C. L., 810.

For the reason assigned the judgment must be upheld.

Affirmed.

J. M. VAUGHAN v. W. T. FALLIN.

(Filed 12 April, 1922.)

Removal of Causes—Transfer of Causes—Actions—Venue—Statutes—Lands—Estates—Title.

Where the owner of lands has sold them at public sale, by a plat showing various divisions thereof, and the purchaser of two of them brings suit to set aside the transaction and to cancel certain of his notes given for the deferred payment of the purchase price, alleging a fraudulent representation by the owner as to the quantity of land in dispute in one of these lots, without which he would not have purchased, the controversy involves such an interest in the lands as required by C. S., 463, to be brought in the county where the land is situated, giving the owner the right to specific performance should he sustain his defense, and on motion aptly and properly made, it will be removed to the proper county when the suit has been brought in another county from that wherein the land is situated.

APPEAL by defendant from the refusal of the motion to remove the cause to another county by *Long, J.*, at the November Term, 1921, of STOKES.

This is an action begun by plaintiff on 5 July, 1921. The complaint was filed 24 August, 1921. Plaintiff alleges that in the year 1920 the defendant owned a large tract of land in the county of Stokes; that during said year he divided up said land for sale and made blueprints thereof; that on 29 May, 1920, the defendant, after due advertisement, held an auction sale of said property, and at that time had the blueprints aforesaid showing to prospective purchasers the boundaries, and representing to them the number of acres in the subdivision of the land; that plaintiff was at the sale, and relying upon the statements and representations and blueprints of the defendant, bid off tracts No. 1 and No. 3, as shown on the blueprints; that at the time of the sale some question arose of a disputed boundary at the northwest corner of lot No. 1; that the defendant stated to the plaintiff that there were four or five acres in the dispute, and that they would allow ten acres off for that dispute; that the original tract No. 1 contained seventy-five acres; that the land in dispute was a small block in the northwest corner of lot No. 1; that the defendant represented that the line had been definitely settled, and that he could convey a clear title to the same, according to the blueprints, less the ten acres; that the plaintiff purchased tracts No. 1 and No. 3 as a whole, and would not have purchased one without the other, and would not have purchased either tract except upon the representation made by the defendant; that the defendant well knew that his statements aforesaid were false and fraudulent; and were made with the purpose of deceiving the plaintiff, and did deceive the plaintiff; that immediately after the sale the plaintiff not knowing that false representations had been made to him as to the title and number of acres contained in the land by the defendant, paid to the defendant $2,339.75, which was one-fourth of the total purchase price of both tracts of land, less the ten acres which were agreed to be taken off to cover the disputed land; that plaintiff relied upon the statements of the defendant as being true, and did not know that the representations made to him were false until about one year thereafter, when the defendant sent to the plaintiff a deed to said lands, which deed showed that it was short twenty-nine and six-tenths acres, whereupon plaintiff refused said deed, and refused to make further payments on said land; that the plaintiff was to pay one-fourth of the purchase price in cash, which he did, as hereinbefore set out, on 29 May, 1920, and was to pay the remainder in one, two, and three years from the date of sale; that plaintiff is entitled to have defendant refund to him the said sum so paid by him, together with interest, and is further entitled to have the contract declared null and void, and any and all notes or obligations which he may have executed to the defendant surrendered and canceled. The prayer to plaintiff's complaint is as follows:

"Wherefore, plaintiff prays judgment against the defendant for the sum of $2,339.75, with interest on said sum at the rate of 6 per cent from 29 May, 1920, until paid, and to have said contract, and any and all notes which plaintiff may have signed surrendered and declared null, void, and canceled of record, and the cost of this action, and such other and further relief as the court may deem just and proper."

Defendant filed a petition for removal of the cause from Rockingham County to Stokes County, on 1 September, 1921, before the time for answering expired. At the same time defendant had notice served upon plaintiff attaching a copy of his petition notifying the plaintiff that the defendant would on 21 November, 1921, at 11 o'clock a. m., before Long, J., at the courthouse at Wentworth, N. C., ask for an order removing the cause to the Superior Court of Stokes County, as requested in his petition. This notice was duly served on 6 September, 1921. The defendant filed his answer to plaintiff's complaint denying all of plaintiff's allegations, and asking for affirmative relief, to wit, specific performance, and also foreclosure of plaintiff's right, title, and interest in the land by reason of his contract of purchase to the end that from the proceeds of sale the indebtedness due by plaintiff to the defendant may be discharged, and the balance remaining paid to plaintiff. This answer was filed on 17 September, 1921. The plaintiff filed his reply on 23 November, 1921.

The cause came on to be heard at the November term of the Superior Court of Rockingham County, upon defendant's petition demanding the removal of the cause to the county of Stokes. Defendant's motion was denied, and to this ruling of the court the defendant excepted and appealed.

J. L. Roberts and McMichael, Johnson & McMichael for plaintiff.
King, Sapp & King for defendant.

WALKER, J. It appears that the land which is the subject of this controversy is situated in the county of Stokes, and this action to cancel and set aside the notes and contract for the sale and purchase of the same was brought in the county of Rockingham. The motion is to change the venue, or place of trial, to the county of Stokes. The motion was denied upon the ground, we presume, that the action was not for the recovery of real property, or for the determination of any interest therein, or for injuries thereto (Pell's Revisal, sec. 419; C. S., 463). Those sections provide that "Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial, in the cases provided by law:

"1. Recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property.

"2. Partition of real property.

"3. Foreclosure of mortgage of real property.

"4. Recovery of personal property."

We cannot see why this case is not governed by the principle stated in *Councill v. Bailey*, 154 N. C., 54. There the plaintiff sought to subject the land by sale thereof to the payment of the purchase money or to compel specific performance by the defendant of the contract to buy the land which was situated in the county of Rowan, while the action was brought in the county of Catawba. Upon a motion by defendant to change the place of trial to Rowan County, we held that the case should have been removed as prayed for by the defendant, and reversed the contrary judgment, citing *Fraley v. March,* 68 N. C., 160; *Connor v. Dillard,* 129 N. C., 50; *Bridgers v. Ormond,* 148 N. C., 375, to which we now add *Wofford v Hampton,* 173 N. C., 686. This case would seem to be the converse of *Councill v. Bailey, supra.* In the latter, the relief demanded was the specific enforcement of the contract by a sale of the land, while here it is sought to cancel the notes and contract, but both involved the determination in some form of a right, or interest, in land. The plaintiff had an equitable right to a deed for the land upon paying or properly tendering the purchase money, and the cancellation of the defendant's right or interest he sought to enforce because the contract had been procured from him by fraud. Whether his right was enforced or annulled, it necessarily determined a right or an interest in the land, and by the terms of the statute it made no difference in what form this was done. *Bridgers v. Ormond, supra,* was an action to recover the possession of a deed for land which was alleged to be held in escrow. The Court said: "The complaint discloses that the purpose of the action is to recover possession of a deed that has never been in possession of the plaintiff. The deed was deposited in escrow, to be delivered upon the performance of a contract entered into by plaintiff and defendant Beaman in respect to the building of a railroad to Hookerton, and the construction of a depot. The land described in the deed is situated in the county of Greene. The plaintiff's right to call for the delivery of the deed depends upon the determination of the fact, in his favor, that he has complied with certain conditions which entitle him to demand and receive the deed. If the allegations of the complaint are denied (which they must be taken to be for the purposes of this motion), then the right of the plaintiff to recover the land, not the deed solely, depends upon his ability to establish the facts he has alleged. Thus it is plain to us that the actual title to the land will depend upon the findings of the jury, under the instructions of the court, to the issues submitted upon the pleadings. The effect of a verdict and judgment for the plaintiff would be to transfer, not simply the deed, but the actual title of the land to him. If the deed should be destroyed in the meantime, the judgment of the court could be made to operate as a deed, or the court could decree the execution of another. Our statute is plain, and provides that actions for the recovery of real property or for the determination of any interest therein or for injuries thereto must be tried in the county where the property is situated. While the plaintiff has now no such seizin as would enable him to maintain an action against a stranger for trespass upon land, he alleges an equitable title thereto, and when he establishes the allegations of his complaint, and a final decree is entered upon the findings, he will become seized, in fact and law, of the property." *Fraley v. March, supra,* was an action against the defendant for specific performance of a contract to purchase land, and the Court held, by *Justice Reade,* that "the law of the *venue* of actions, with reference to the residence of the parties, does not govern this case, but the law of the venue with reference to the 'subject of the action.' It is substantially an action 'for the foreclosure of a mortgage of real property'; and that must be tried in the county where the land is situated. C. C. P., 66."

It is true that, as a general rule, a party seeking the aid of the court may select the forum (*Hannon v. Power Co.,* 173 N. C., 522), but that case also holds that he may do so, except where not prohibited by public policy, as expressed by statute. It must follow that as the question has been finally and definitely settled by our statute and decisions, against the plaintiff's contention and the judge's ruling, the latter must be reversed and the case removed as prayed for by the defendant.

Reversed.

TOWN OF SELMA v. J. R. NOBLES ET AL.

(Filed 12 April, 1922.)

1. **Eminent Domain—Condemnation—Statutes—Exceptions—Dwellings—Municipal Corporations—Cities and Towns.**

   Where a city, under its charter, is given the same power to condemn lands of private owners for municipal purposes that is given to railroads and other public utilities, it is bound by the restrictions placed on them by C. S., 1717, which provides that such power shall not extend, among other things, to dwellings, without the consent of the owner; and the principle arising under the general power to condemn, leaving the matter largely within the discretion of the governing authorities seeking condemnation, does not apply to the statutory exceptions.

2. **Eminent Domain — Condemnation — Clerks of Court— Procedure—Appeal—Jurisdiction—Courts.**

   Where issuable matters are raised before the clerk in proceedings to condemn the lands of private owners for a public use, the clerk should pass upon these matters presented in the record, have the land assessed through commissioners, as the statute directs, allowing the parties, by exceptions, to raise any question of law or fact issuable or otherwise to be considered on appeal to the Superior Court from his award of damages, as provided by law.

3. Same—Injunction.

Under the method of procedure in the condemnation of lands for a public use: *Held*, that issuable matters raised by the parties should be taken advantage of by exceptions, and the entire record sent up to the Superior Court by the clerk, where all exceptions may be presented, the rights of the parties may be protected meantime from interference by injunction issued by the judge on application made in the cause, and in instances properly calling for such course.

4. Eminent Domain—Condemnation—Municipal Corporations—Cities and Towns—Streets—Offer to Dedicate—Acceptance.

Where a municipal corporation has not accepted the offer of a private owner of lands to dedicate the streets and an open square of his lands he has had platted for sale, the proceedings of the municipal corporation to condemn a part of these lands for a public use presents entirely a question of private ownership, and of itself sets up no issue in bar of condemnation proceedings before the clerk, pursuant to the statutory authority and according to the course and practice of the court.

5. Same—Acquired Jurisdiction.

Where the clerk of the Superior Court has erroneously at once transferred the proceedings in condemnation to the Superior Court on issue joined between the parties, and an appeal therefrom has been taken to the Superior Court, the judge thereof acquires jurisdiction for the hearing and determination of the controversy under the provisions of C. S., 637, and may order other proper or necessary parties to be made for the further determination of the cause.

6. Eminent Domain — Condemnation—Nuisance—Dwellings—Statutes—Exceptions.

The creation and maintenance of a nuisance which sensibly impairs the value of lands of private owners is a taking within the principle of eminent domain and condemnation proceedings thereunder, and within the exception contained in C. S., 1714, withdrawing dwellings from the effect of the statute.

7. Same—Appeal—Superior Courts—Courts—Jurisdiction—Discretion of Court—Parties—Trials.

The owner of land divided it into building lots, upon condition of the advantages of a square to be kept open for their use, and some of these lots had been purchased and built thereon for homes. The town, not having the statutory authority to condemn dwellings, instituted proceedings to condemn this open square for an addition to the city cemetery, and upon issue joined in Superior Court as to whether a cemetery so situated would be a nuisance and injure the homes upon the lots sold, the clerk, under exception, erroneously transferred the proceedings for trial at term: *Held*, it was in the discretion of the Superior Court judge to make the purchasers of the homes parties and hold the case for the determination of the jury before proceeding further.

PROCEEDINGS to condemn land of defendant J. R. Nobles *et al.*, heard on exception and motion to remand, before *Cranmer, J.*, presiding in the courts of the Fourth Judicial District, in October, 1921.

It appears from a perusal of the record and case on appeal that the town of Selma, under and by virtue of chapter 116, Private Laws of 1915, amending charter of said town, instituted the present proceedings before the clerk of the Superior Court to condemn about two and one-half acres of land belonging to defendant Nobles as an addition to the public cemetery of the town, which was about filled except certain plats owned by individuals. Defendant Nobles answered alleging that he owned a body of land lying in the suburbs of Selma, or adjacent thereto, which he had laid off and platted into lots, showing designated streets, etc., and in which the plat desired had been made to appear as a public square, and various persons had bought lots in reference to this plat, and in reliance on the representation that same was to be and remain a public square, and some of them had improved these lots and were living thereon; and there was no necessity for this land, as the town owned a body of land near there, much better suited for its purpose, and on his answer demanded, among other things, a jury trial as to necessity for taking defendant's land for the purpose indicated, and also as to the amount of damages to be awarded in case the same was taken, etc.

The clerk being of opinion that the answer raised material issues, entered an order transferring the cause to the Superior Court for trial of same before the jury, and petitioners excepted and appealed to Superior Court. In the Superior Court his Honor, being of opinion that there were material issues raised, entered judgment approving the action of the clerk, and that the defendant was entitled to have same tried by a jury, etc., and that the costs be taxed against the appellant. Petitioners excepted. The court further ordered that J. T. Newberry and four others who had bought land of codefendant under conditions as stated, and had improved same, be made parties defendant. Thereupon these defendants became parties, and answered alleging the facts of sale and dedication of this land as a public square by defendant Nobles; that they had bought and improved their lots in reference to same, and were living thereon with their families. That the town had not extended its water supply to this locality, but they procured their water from wells, and allege further: "That the location of the cemetery on this lot of land will greatly damage and injure them, in the use and enjoyment of their property, by depriving them of the use of said public square, and by closing Chestnut Street, and by partially closing Third Avenue.

That from about the center of said public square the ground slopes both in a northwestwardly and easterly direction. That the town of Selma has not extended its water mains to defendants' property, and that they are dependent upon wells for their water supply. That due to the condition of the soil and the sloping of the land from said public square, the drainage from said public square is by and through the lands of these defendants and the use of said public square for burial purposes would contaminate and pollute the only water supply these defendants have, rendering it unsafe and unfit for drinking purposes of these defendants and the members of their families, to the very great damage of these defendants.

The court, on this and the answer of J. R. Nobles, being of opinion that there were material issues raised which must be decided by a jury before further proceedings had, entered judgment, as stated, affirming the action of the clerk and in denial of plaintiff's motion to remand, etc. Thereupon petitioner excepted and appealed to this Court.

R. L. Ray and Winfield H. Lyon for plaintiffs.
Walter L. Watson and Albert M. Noble for defendants.

HOKE, J. The charter of the town of Selma, as amended by chapter 116, Private Laws of 1915, conferred upon the municipal government the right to condemn land for purposes of a cemetery, "in the same manner as lands are condemned by railroads and public utility companies, and with the same rights of appeal." Under C. S., ch. 33, these companies have the right to condemn lands desired for the construction of their roads, etc., by special proceedings as therein described, and section 1714 of the statute provides that such power shall not extend to the condemnation of a dwelling-house, yard, kitchen, garden, or burial ground without the consent of the owner, unless the same is expressly authorized by the charter or some provision of the Consolidated Statutes.

In construing this legislation, the Court has held that where the general power to condemn exists, the right of selection as to route, quantity, etc., is left largely to the discretion of the company or corporation, and does not become the subject of judicial inquiry except on allegations of fact tending to show bad faith on the part of the company or corporation or an oppressive and manifest abuse of the discretion conferred upon them by the law. *Power Co. v. Wissler,* 160 N. C., 269. As to the procedure in a case of this kind, our decisions are to the effect that notwithstanding the appearance of issuable matter in the pleadings, it is the duty of the clerk, in the first instance, to pass upon all disputed questions presented in the record, and go on to the assessment of the damages through commissioners duly appointed, and allowing the parties, by exceptions, to raise any questions of law or fact issuable or otherwise to be considered on appeal from him in his award of the damages as provided by law. *R. R. v. Mfg. Co.,* 166 N. C., 168; *Abernathy v. R. R.,* 150 N. C., 97; *R. R. v. R. R.,* 148 N. C., 59.

In *Abernathy's case, supra,* the principle is stated as follows: "While in other special proceedings, when an issue of fact is raised upon the pleadings, it is transferred to the civil issue docket for trial, in condemnation proceedings the questions of law or fact are passed upon by the clerk, to whose rulings exceptions are noted, and no appeal lies until the final report of the commissioners comes in, when, upon exceptions filed, the entire record is sent to the Superior Court, where all exceptions may be presented." The method of procedure indicated in these cases should hold, though there should be issues raised concerning an owner's dwelling-house and other, the cases excepted from the operation of the statute, and in such case, on proper showing, the rights of the parties may in the meantime be protected from interference by injunction issued by the judge, on application made in the cause. *Retreat Asso. v. Development Co., ante,* 43.

This being the law applicable, we see nothing in the pleadings, as presented before the clerk, that should prevent his proceeding to an award of damages, as the statute directs, the allegations being that the owner had laid off this property into streets and blocks, leaving this particular block as an open square, and that certain persons had bought property in reference to the plat made. This was throughout, as we understand the record, entirely a question of private ownership, the municipality never having accepted this as a dedication to the public, and though the claimants might very properly have been made parties, there is nothing to prevent or modify the power of condemnation given to the municipality by its charter.

Taking a different view of the matter, however, the clerk decided to transfer the cause for trial of the issues in the Superior Court, and refused to proceed further, whereupon plaintiff excepted and appealed.

The cause having then been brought before the Superior Court, under C. S., 637, the judge had "jurisdiction," and in the exercise of the powers so conferred, his Honor entered an order that the purchasers of portions of defendant's property abutting on the square should be and they were made parties defendant, and filed an answer alleging, among other things, that they had bought and built on the abutting property, and occupied same; that the town had not extended its water supply to that locality, but their water for drinking and other domestic purposes was obtained from wells on the premises; that the drainage was directly from the square in question on and through their premises, and an establishment of a cemetery on said block would create a nuisance, endangering the health of their families, etc.

It is held with us that the creation and maintenance of a nuisance which sensibly impairs the value of property is a taking within the principle of eminent domain, and condemnation proceedings thereunder. *Hines v. Rocky Mount,* 162 N. C., 409, and authorities cited. And if it should be established that the maintenance of a cemetery at the place contemplated creates such a nuisance, so affecting the homes of these defendants, this would bring the case within the exception contained in section 1714, withdrawing dwellings from the effect of the statute, and the power to condemn would no longer exist. While no such issue was presented in the pleadings before the clerk, it is raised now by defendants, and being an issue in bar of plaintiff's right to proceed, and on the facts as presented, it was within the sound discretion of his Honor to have the same passed on by a jury before proceeding further, a course approved and substantially pursued in *Clark v. Lawrence,* 59 N. C., 83.

Undoubtedly the Legislature could confer the power to condemn property for a public purpose, even to the extent of taking a man's home, for all private property is liable to be appropriated for the public use in the reasonable exercise of the police power. *Thomas v. Sanderlin,* 173 N. C., 329, citing 6 R. C. L., 193. And in no event should a public need of this kind be lightly stayed, but if it should be clearly established on an appropriate issue that the maintenance of a cemetery on the proposed site will create a nuisance, causing substantial damage to the homes of these defendants, then the plaintiff must fail in its petition, for in such case, as stated, the power to condemn the site has not been conferred.

His Honor, therefore, was well within his legal discretion in directing that this vital question should be predetermined by the jury.

Affirmed.

PIEDMONT POWER AND LIGHT COMPANY v. L. BANKS HOLT MANUFACTURING COMPANY.

(Filed 19 April, 1922.)

1. **Payment — Duress— Contracts—Evidence—Courts—Judicial Notice—War.**

Where there is evidence that the plaintiff, an electric power company, has induced the defendant, a manufacturer, to scrap and sell the steam-power plant he was then using and enter into a contract with it for a term of years to furnish the electric energy required for the operation of the manufacturing plant, and after increasing the price, by agreement with the manufacturer, arbitrarily makes a further increase before the termination of the contract, during war conditions, and when the manufacturer could not get the electrical power elsewhere, *it is held,* the court will take judicial notice of the chaotic conditions prevailing during the war, and while the defendant is chargeable for the increase he has agreed to pay, the question is raised for the determination of the jury whether the defendant protesting against but continuing to pay the increase, did so under duress.

2. Same—Actions.

Where a debt has been paid by one under duress in excess of that due the creditor under the existence of a contract, the amount in excess so paid may be recovered by the debtor in his action, there being no consideration therefor.

3. Public-service Corporations — Corporations — Contracts— Increase in Charges—Corporation Commission.

Where a public-service corporation desires to increase its charges for electrical energy furnished to the owner of a manufacturing plant over those agreed upon by contract, it is the duty of the furnisher of the power to apply to the Corporation Commission for the right to charge the increase, and cannot otherwise raise the rate to the manufacturer, whose rights are acquired under the contract, without his assent.

APPEAL by both parties from *Daniels, J.,* at September Term, 1921, of ALAMANCE.

The plaintiff is a public-service corporation, with its principal office at Burlington. On 21 December, 1915, it entered into a contract with the defendant to furnish it electric power to operate and light its mills situated in the town of Graham at the rate of one cent per k. w. h. for electric energy. This contract was later modified by divers agreements to the basis of one and one-half cents per k. w. h. In September, 1921, the plaintiff wrote the defendant advising that on account of increased cost due to war conditions it would be necessary to raise the rate to two cents per k. w. h., and thereafter the bills were made out against the defendant at that rate. The defendant pleaded as a counterclaim all collected above the one and one-half cent rate which it had paid from November, 1918, to June, 1920.

At the close of the evidence, on motion of the defendant, the court directed a judgment of nonsuit as to the plaintiff's claim to recover the amount in excess of one and one-half cents, which excess the defendant had refused to pay after June, 1920.

The court charged the jury that if they found the facts to be as testified to by the witnesses they should answer against the defendant the issue on its counterclaim to recover back the excess above one and one-half cents which the defendant had paid on plaintiff's demand between November, 1918, and June, 1920. Judgment accordingly, and appeal by both parties.

J. J. Henderson and A. L. Brooks for plaintiff.

Bynum & Alderman, Banks H. Mebane, and Parker & Long for defendant.

CLARK, C. J. The contract made between the plaintiff and defendant in December, 1915, stipulated a schedule of rates on a basis of one cent per k. w. h. This contract was to extend for five years from 1 April, 1916, and thereafter until terminated by either party upon 6 months notice given in writing to the other. In October, 1917, the defendant agreed to increase this amount to be paid by .003 (three mills) per k. w. h. for 6 months from 1 October, 1917. On 1 June, 1918, the defendant, in writing, agreed to pay for said electric current, in addition to the amount previously paid, the sum of .005 (five mills) per k. w. h. "only so long as the cost of New River or Pocahontas coal shall be more than $5 per ton f. o. b." The current was billed the defendant on this agreement at one and one-half cents per k. w. h. until 2 or 3 September, 1918. On that date the plaintiff wrote defendant a letter with a full statement of their expenses and financial condition, and said: "It is now necessary for us to arrange to increase our rate to our large customers to two cents per k. w. h., and to ask our lighting customers to pay us a surcharge of 30 per cent as long as present conditions prevail." After this, beginning in October or November, 1918, the plaintiff charged the defendant, and the defendant paid for current, at the rate of two cents per k. w. h. until June, 1920. In the spring of 1919 Mr. Williamson, active manager of defendant, advised plaintiff that he was "going to get power elsewhere at a lower rate than the two cents charged" by the plaintiff.

When the contract was made between the plaintiff and defendant in 1915, the defendant was operating its plant with power generated by steam, and upon the faith of that contract they scrapped and sold their steam plant. In June, 1920, the defendant notified the plaintiff that they would no longer pay for current for power in excess of one and one-half cents per k. w. h., and demanded repayment for all in excess of this sum, and this is the counterclaim set up in this action.

The plaintiff was under an absolute contract to supply the defendant with all the current it desired to use for 5 years from 1 April, 1916, at the rate specified. This sum was afterwards increased by consent to one and one-half cents per k. w. h., which sum was duly paid. "Where an electric light or power company, operating under a *quasi*-public charter, enters into an ordinary contract to furnish electricity for a given number of lights or for a given amount of power, the obligation as to the amount of power or light to be supplied must be construed and determined according to the general principles of contract, which, as a rule, are absolute." *Turner v. Power Co.,* 154 N. C., 135.

Under the laws of this State the plaintiff could have gone before the Corporation Commission and have made an application to raise its rates. *In re Utilities Co.,* 179 N. C., 161; *Dry Goods Co. v. Public Service Co.,* 248 U. S., 372. This was not done, but the plaintiff arbitrarily notified the defendant that it had raised its rates to two cents per k. w. h.

The following agreement is set out in the record: "It is agreed between the plaintiff and defendant that if the plaintiff is entitled to recover the difference between the one and one-half cents and the two cents demanded for power supplies by the Piedmont Company of the L. Banks Holt Manufacturing Company after June, 1920, that the amount sued for by the plaintiff is correct, and it is further agreed that if defendant is entitled to recover on his counterclaim for payments made for power from September, 1918, to June, 1920, in excess of the rate of one and one-half cents per k. w. h., then the amount set out in this answer as a counterclaim is the correct amount to which defendant is entitled."

The pleadings show that the defendants began, in July, 1920, to deduct from the monthly bills for current used by it the sum of one-half cent per k. w. h., paying to plaintiff one and one-half cents per k. w. h., and retaining the balance of one-half cent per k. w. h., and that the amount so retained by the L. Banks Holt Manufacturing Company amounts to $4,172.64; and this is the amount sued for as per the above agreement. On the other hand, the defendant claims as a counterclaim the difference between one and one-half cents and two cents for electric current which it paid without any agreement or by any order of the Corporation Commission from November, 1918, to June, 1920, amounting to the sum of $9,529.33.

The defendant asked the court to charge the jury: "If you should find from the evidence and by its greater weight that the defendant paid the difference between one and one-half cents and two cents for its electrical current in order to prevent the shutting down of its mill, and so as to continue operating same, then I charge you to answer the issue 'Yes,' and to fix the amount at $9,529.33," which was refused, and the defendant excepted. The defendant further asked the court to charge the jury: "If you shall find from the evidence and by its greater weight that the defendant had no other source from which to obtain power to operate its mill, and that it paid the difference between one and one-half cents and two cents for the time that it did pay same in order to obtain power to operate its manufacturing plant, and in order to prevent the shutting down of the same, then I charge you to answer the issue 'Yes,' and to fix the amount at $9,529.33."

The evidence as to whether the plaintiff could have made a profit, or even expenses, if the rate had not been raised by it above one and one-half cents is irrelevant and immaterial. The plaintiff was a public-service corporation, and had made a contract extending for five years from April, 1916, at the rate of one cent per k. w. h., and then to terminate only upon six months notice. During the lifetime of that contract there had been modifications increasing the rate by agreement to one and one-half cents, but the plaintiff could not go beyond that agreement except by order of the Corporation Commission.

The defendant scrapped its steam plant upon faith in the contract made in 1916 for five years, and later voluntarily assented to increase the price to one and one-half cents. If the demand for the extra one-half cent was paid under duress, "payment coerced under duress or compulsion, though not made in ignorance of the fact, may be recovered." Within this rule are payments of charges or exactions under apprehension on the part of the payers of being stopped in their business if the money is not paid. *Brewing Co. v. St. Louis,* 2 A. & E., Anno. Cas., 821, and notes.

In *Newland v. Turnpike Co.,* 26 N. C., 372, *Ruffin, C. J.,* said: "It was, however, objected on the trial that although the money was not due to the company the plaintiffs could not recover it back because they had paid it without suit and voluntarily; but this objection counsel very properly abandoned here. The payment was not voluntary, that is, as payment of a debt admitted to be due and willingly made; but it was made as a means of obtaining a passage over the road for the mail which the plaintiffs were obliged to carry, and of keeping their property from being taken from them by duress; and so it was compulsory and without consideration."

In *Lumber Co. v. R. R.,* 141 N. C., 191, it is said: "It is not necessary that at the time of payment there should be any protest. The nature of the business considered, the shipper does not stand on equal terms with the carrier in contracting for charges of transportation, and if the shipper pays the rates established in violation of law to the carrier rather than forego his services, such payment is involuntary in the legal sense, and the shipper may maintain his action for money had and received to recover back the illegal charge."

The manufacturing company had scrapped its steam plant and the Court must take judicial notice that at this time there was a chaotic condition in industry, so that it was practically impossible for the defendant to arrange for power elsewhere, and in view of the testimony that in 1919 the protest was so vigorous that the defendant was trying to get power elsewhere, and that in June, 1920, it positively refused to pay this price, the matter should be referred to the jury upon the instructions asked and refused whether the payment was made under duress or not. It was useless to protest, and the law does not require the doing of a vain thing. *Gerringer v. Ins. Co.,* 133 N. C., 417; *Bateman v. Hopkins,* 157 N. C., 474.

There was no duty upon the defendant to apply to the Corporation Commission, for it had an absolute contract by which the rates were fixed. The plaintiff was bound by those rates until relieved by the Corporation Commission.

In *Public Service Co. v. Finishing Co.,* 178 N. C., 546, the public-service company applied to the Corporation Commission and received permission to increase its rates in the corporate limits of Salisbury. The public-service company attempted to increase its rates beyond the limits of Salisbury to a customer whom it was under contract to serve at rates specified in the contract. The Court held that it could not do so, and that the contract was binding, and the Court in that case, in effect, held that the contract was binding until changed by the Corporation Commission. The exact question presented was decided in *Power Co. v. Burditt Bros.,* in 1920, Public Utility Reports, 1921 B, 6, where the Court said: "It is suggested by the plaintiff that if the defendants felt aggrieved by the action of the plaintiff in raising the rate, their remedy was by complaint to the Public-service Commission, but it was not necessary for them to pursue that course. The contract rate was valid and binding upon both parties, but subject to revision by the public-service corporation, as the public good might require."

If this sum was not paid by agreement, then certainly it can be recovered back. An agreement to pay this sum would have been void unless there was some consideration, as the plaintiff was doing nothing which was not already under contract to do. The prayers for instruction should have been given, and the court should have left it to the jury to determine whether this sum was paid in order to prevent the shutting down of its mill. In refusing this instruction the judge in effect told the jury that there was not a scintilla of evidence that defendant had paid to keep from shutting down his plant and to prevent injury to his property.

There is, therefore, simply and purely a question of damages for breach of contract. The amount of such damages is settled by the agreement above set out, dependent upon the proposition of law. The sole issue in effect is whether the defendant, by not giving an earnest protest, acquiesced in the illegal demand from November, 1918, down to June, 1920; or whether, having scrapped its steam plant upon making this contract, it was forced to make the payment demanded under duress lest its plant might be closed.

It is very clear that the plaintiff's demand cannot be sustained and the court properly so charged, for after June, 1920, the defendant not only protested, but absolutely refused to pay. We think that the two prayers of instruction asked by the defendant should have been given and the jury should have found whether the defendant made the payment of the extra one-half cent per k. w. h. between November, 1918, and June, 1920, by duress. If the answer is in the affirmative, the amount of that verdict is agreed upon as above stated. If the answer is in the negative, then the defendant will not be entitled to recover anything. In refusing these instructions there was, in the defendant's appeal, error for which there should be a

New trial.

In the plaintiff's appeal the judgment of nonsuit should be

Affirmed.

B. FRANK MEBANE v. ROBERT BROADNAX ET AL.

(Filed 19 April, 1922.)

Attorney and Client—Trusts and Trustees—Attorney Deriving Adverse Title to His Client.

The relation of an attorney to his client in regard to the subject-matter of litigation is one of great trust and confidence, and he may not acquire a title thereto or interest therein adverse to his client, or to his prejudice, without his client's consent, even though the attorney may have received no fee and intended no fraud; and where, in violation of the confidence of his client thus imposed, he acquires such title or interest, he will be decreed to hold it in trust for him.

APPEAL by defendants W. R. Dalton and Mrs. Robert Broadnax from *Long, J.*, at November Term, 1921, of ROCKINGHAM.

This was an action originally begun against Robert Broadnax and wife and T. H. Chumley, and the complaint, filed in January, 1919, alleged that the plaintiff was entitled to a deed against Robert Broadnax and his wife for a tract of land of about 400 acres, known as "Hunter's Delight." The original plaintiff, Mebane, contended that he was entitled to the deed by virtue of a certain paper-writing, referred to as an option or contract to convey, and prayed that the court would require the defendants Broadnax and wife to convey said land to him and not to their codefendant, T. H. Chumley, who had agreed to purchase the land from them. The defendants, Broadnax and wife and Chumley, filed an answer denying that the plaintiff was entitled to a deed for the land, and the defendant W. R. Dalton, now a defendant in this action, signed the pleadings as counsel for T. H. Chumley and Broadnax and wife. In May, 1919, he had himself made defendant to the action, and set up that he had purchased the land from Broadnax and wife and held a fee-simple deed to the same.

On 21 June, 1921, T. H. Chumley, a defendant in this action, by a leave of the court filed an amended answer through his present counsel, stating that he was advised that the defendant W. R. Dalton, while acting as counsel for him, had purchased the land for himself and not for his client, T. H. Chumley; that as he had purchased it for his client, he claimed the conveyance for himself upon the repayment to W. R. Dalton of the money and obligations assumed by him in the purchase, and that if he had not purchased it for his client, T. H. Chumley, that he be declared a trustee to that effect and required to convey the property, upon reimbursement by said T. H. Chumley.

The case was tried at a former term and the court determined that the original plaintiff, B. Frank Mebane, could not sustain his cause of action. This left the contest between T. H. Chumley and his former counsel, the defendant W. R. Dalton. At November Term, 1921, the issue between Chumley and Dalton was tried, and the jury found that defendant had purchased and held the land as trustee for the use and benefit of his former client, T. H. Chumley, and a decree was entered accordingly.

The following appeared to be the facts of the controversy between Chumley and Dalton: In August, 1918, Broadnax and wife agreed to sell the tract of land in dispute to T. H. Chumley, who had been a tenant thereon for a number of years. Agreeing upon the price of $10,000, one-half to be paid cash and the balance in two equal installments, one and two years, the party went to Wentworth to execute the deed and the mortgage to secure the balance due. They employed Dalton, told him to look up title and prepare the papers. Mr. and Mrs. Broadnax were to pay the fee for these services. All parties to the agreement were present and agreed in placing the matter in Dalton's hands. Upon examination of the record, he advised the defendants Broadnax and Chumley that the title was clear.

After leaving the courthouse, P. W. Glidewell, who was acting as attorney for B. Frank Mebane, approached Dalton and Chumley and stated to them that Mebane claimed this land and that Broadnax did not have a right to sell it, and Mebane intended to bring suit to prevent the sale. Dalton stated to Chumley that he need not bother about that, as he, Dalton, would look after the matter. Mr. and Mrs. Broadnax and Chumley then went with Dalton in an automobile to an attorney's office in Reidsville and Dalton began the preparation of the deed and mortgage for the transfer of the property to Chumley. At this juncture, an officer served the summons in the action by Mebane upon Broadnax and Chumley. Dalton then stated to Chumley that nothing more could be done in the matter of the sale until the litigation was out of the way; that he would represent them and file the proper answer.

The defendant Chumley is an illiterate man, and cannot read or write except to sign his name. Shortly thereafter the defendants Dalton and Broadnax started negotiations, without the knowledge of Chumley, whereby Dalton purchased the land from Mr. and Mrs. Broadnax and took a fee-simple deed to himself. To protect himself he entered into a contract with Broadnax on 26 December, 1919, in which the terms for the payment of the land are more favorable than those which had been agreed upon between Broadnax and Chumley, and, in addition, Mr. and Mrs. Broadnax agreed to hold the said Dalton harmless against any adverse judgment that might be obtained in the pending action and this paper was deposited with the president of the bank in Reidsville, of which Dalton was counsel and in whose building he had his office.

Dalton did not deny that he did not inform Chumley of his negotiations with Broadnax and wife, and Chumley relied solely upon Dalton as his counsel, and did not engage other counsel until he learned many months afterwards that Dalton had taken a deed to the land, which he thought had been done to protect him against Mebane, and did not understand that it was taken by Dalton on his own behalf; thus defeating his own chances to get the land.

At the time of the conclusion of the litigation with Mebane the land was worth from $13,000 to $15,000, and still is. T. H. Chumley has a contract to sell the land for $13,000, and his complaint is that he should have this profit of $3,000 and not his counsel. Dalton knew nothing of the value of the land and the opportunity of profit in its purchase until the matter was called to his attention in his employment by his client, T. H. Chumley.

The jury found in response to the issue that Dalton purchased the land in question, and now holds the same, as trustee for T. H. Chumley and judgment was entered accordingly. Appeal by defendants.

A. L. Brooks and J. R. Joyce for T. H. Chumley.
Manly, Hendren & Womble and W. R. Dalton for Mrs. Broadnax.
R. C. Strudwick and W. M. Hendren for W. R. Dalton.

CLARK, C. J. The obligation resting upon the attorney by virtue of relationship of client and attorney in such cases as this is thus stated in *Baker v. Humphrey,* 101 U. S., 494: "It may be laid down as a general rule that an attorney can in no case, without the client's consent, buy and hold otherwise than in trust any adverse title or interest touching the thing to which his employment relates. He cannot in such way put himself in adverse position without this result. The cases to this effect are very numerous, and they are all in harmony." This opinion contains a very clear statement as to the high duties and responsibilities of an attorney to his client.

In 2 R. C. L., 970, the rule is thus stated: "It is well established that a purchase by an attorney, without the consent of his client, of an interest in the thing in controversy, in opposition to the title of his client during a litigation concerning the same, is forbidden, because it places him under temptation to be unfaithful to his trust. It is contrary to the policy of the law, and also contrary to the principles of equity, to permit an attorney at law to occupy at the same time, and in the same transaction, the antagonistic and wholly incompatible position as adviser of his client concerning a pending litigation threatening his title to the property and that of the purchaser of such property in opposition to the title of his client. All such purchases, therefore, inure to the benefit of the client."

In *Bucher v. Hohl,* 199 Mo., 320; 116 Am. St., 492, the client had consented to a decree prepared by counsel, and 10 years afterwards, and after a third party had acquired title to the property, she sought to have it avoided and the counsel charged as trustee of the property acquired under it and the Court thus said: "The evidence shows only a case of implicit trust and confidence in her attorneys, and if she acquiesced in that decree it was because her attorneys told her that it was the best that could be done for her. Under those circumstances her attorneys cannot avail themselves to their advantage, and to her disadvantage, of her acquiescence; as to that, she is not estopped in claiming her own."

Such conduct is condemned by the Canons of Ethics, both of the American and State Bar Associations, art. 10 of the latter providing: "The lawyer should not purchase any interest in the subject-matter of the litigation which he is conducting."

In 6 Corpus Juris., p. 682, sec. 208, it is clearly stated as follows: "A client has the right to treat all acts of his attorney in any matter intrusted to him as done for his benefit. Equity and public policy are opposed to an attorney deriving any advantage in relation to the subject-matter involved, which is obtained at the expense of the client, even though there is no actual fraud on the part of the attorney. It results that in all cases where an attorney purchases property involved in litigation or any other property connected therewith, obtaining it under a special advantage in consequence of knowledge or information acquired through his client, or in the conduct of the case, his client may elect to treat him as a trustee for his benefit, and compel him to account for all profits, or to convey to him the property, subject only to a lien for his services and expenditures. An attorney cannot make use of any knowledge acquired by him through his personal relations with his client to promote his own advantage, but in every such case will be conclusively presumed to be acting for his client's benefit."

The authorities are numerous and all to the same effect. In *Crocheron v. Savage* (N. J.), 23 L. R. A. (N. S.), 679, the Court said: "It is not necessary to find that the attorney was guilty of an intentional wrongdoing. The reason why he did not disclose the material facts upon which we have commented is not important. The fact that he did not disclose them is sufficient. The law looks on transactions of this kind between an attorney and his client with suspicion, and will not permit a conveyance to the attorney to stand unless the attorney demonstrates the entire good faith of the transaction. It requires him to be absolutely frank and open with his client, to disclose every fact of which he has knowledge, and, as well, any professional opinion he may have formed, which could in any way affect the client in determining whether or not to make the conveyance."

In *Roby v. Colehour,* 135 Ill., 300, it was held: "There can be no acquiescence or ratification of such purchase, unless the client at the time of the alleged ratification is aware of the nature and extent of his actual rights, or that the advice of his attorney was incorrect."

This Court, in *Gooch v. Peebles,* 105 N. C., 426, in which the counsel contended that his employment was only in a limited capacity, held that his liability was complete responsibility, and that it made no difference that no fee had been paid, the Court saying: "This cannot alter the case." In stating the duties of attorneys, the Court said: "He is an officer of the courts in which he may practice, and occupies a *quasi*-official relation to the public, and when he assumes the duties of attorney to his clients one of these, undoubtedly, is to communicate to his client any fact within his knowledge relative to the business about which he is employed that it may be important for the client to know; and having once assumed the relation of attorney to client, he cannot terminate it at his pleasure, and without notice to his client, so long as anything remains to be done about the matter in which he is so employed."

The Court further held in that case that actual fraud was not necessary to compel an accounting on the part of the attorney, saying: "It was not necessary that there should have been any actual fraud in the transaction, but the rule which forbids it rests upon the broad principle of public policy which precludes persons occupying these fiduciary relations from representing conflicting interests that may tempt them to disregard duty, and lead to injury on one side or the other"; and cited with approval Weeks on Attorneys at Law, sec. 258: "An attorney employed, or consulted as such, to draw a deed, or an application for an original title to land, is precluded from buying for his own use any outstanding title. In such case, the relation is confidential, and whether he acts upon information derived from his client or from any other source he is affected with a trust. The rule is on the ground of public policy, not of fraud, and prevails, although the attorney be innocent of any intention to deceive and acts in good faith."

In *Lee v. Pearce,* 68 N. C., 76, *Chief Justice Pearson,* in discussing the doctrines of our law, and the burden of proof, applicable to fiduciary relations, says that "One of these relations is attorney and client in respect to the matter wherein the relationship exists," and that any transaction had between them affecting the subject-matter of the trust raises a presumption of fraud as a matter of law, to be laid down by the judge as decisive of the issue, unless rebutted.

This latter case has been very recently quoted with the fullest approval in *Stern v. Hyman,* 182 N. C., 424, in which this Court says: "The able opinion in this case by *Chief Justice Pearson* laid down the eternal principles of equity and fair dealings, from which this Court has never deviated"; and added that in that case upon the evidence of the counsel himself "The judge should have held the alleged contract, if made, to have been void as a matter of law."

In this case the court might well have instructed the jury that upon the defendant Dalton's own showing the relation of trustee existed, and that he could not acquire and hold the land in dispute adverse to his client, the plaintiff Chumley. The court, however, submitted the question to the jury, who have rendered a verdict against the defendant and in favor of the plaintiff.

There must always be the most absolute good faith, *uberrima fides,* on the part of any attorney towards his client. There can be allowed no suspicion of self-serving on the part of the attorney in any dealings with his client. The court will not permit that

"Self the wavering balance shake."

If there has been profit made for himself by counsel out of the relationship contrary to the duty that his knowledge and his skill must be used solely for the benefit of that client, the court will always set aside the transaction, or decree that the benefit which the attorney has reaped must be held in trust for the benefit of the client, though no fee may have been paid by the client and no fraud was intended by the attorney.

The decree in this case, made in accordance with the verdict, is approved.

No error.

R. M. JONES v. UNION GUANO COMPANY, INC.

(Filed 19 April, 1922.)

Constitutional Law—Contracts—Fertilizer—Statutes.

C. S., 4697, requiring that no damages to or a shortage of crops may be recovered when resulting from the use of fertilizer sold for the purpose of raising them, except after chemical analysis showing deficiency of ingredients, where no claim that the sale is prohibited by statute or that the sale was dishonest or of fraudulent goods, does not impair the right of contract, and is constitutional and valid. *Fertilizer Works v. Aiken,* 175 N. C., 402; *Fertilizer Co. v. Thomas,* 181 N. C., 274, cited and approved.

APPEAL by plaintiff from *Long, J.*, at November Term, 1921, of ROCKINGHAM.

Civil action to recover damages for an alleged breach of warranty in the sale of certain fertilizers; plaintiff alleging that his crop of tobacco was injured by reason of some deleterious or harmful substance contained in the fertilizer sold by the defendant.

At the close of plaintiff's evidence there was a judgment as of nonsuit, from which this appeal is prosecuted.

J. M. Sharp and Fentress & Jerome for plaintiff.

O. O. Efird, Glidewell & Mayberry, Manly, Hendren & Womble, and Swink & Hutchins for defendant.

STACY, J. This is one of nineteen suits brought by resident farmers of Rockingham County against the Union Guano Company for alleged crop damage or shortage occasioned by reason of the use of certain fertilizer manufactured and sold by the defendant. See *S. c.*, 180 N. C., 319.

The plaintiff in this particular case bought fifty-one sacks of the fertilizer in question, and upon trial there was evidence tending to show its inferior quality, deficiency of stated ingredients, injury to the crop of tobacco, etc. But his Honor dismissed the action and entered judgment as of nonsuit upon the ground that there had been no compliance with C. S., 4697, with respect to having the fertilizer tested by chemical analysis, as required by said section as a condition precedent to plaintiff's right to maintain this suit. Upon the record it must be conceded that plaintiff has failed to meet the requirements of the law, which clearly provides that no suit for shortage, or damage to crops, resulting from the use of fertilizers shall be brought, except after chemical analysis showing deficiency of ingredients, unless the dealer has been selling goods that are outlawed by the statute, or has offered for sale in this State, during the season, dishonest or fraudulent goods. *Fertilizer Works v. Aiken,* 175 N. C., 402.

In order to surmount the barrier and to obviate the difficulty thus presented, plaintiff attacks this section of the law, relating to agriculture, as unconstitutional and void. He says its provisions are unreasonable and impossible of fulfillment. But we are unable to agree with the plaintiff in this position. The reasons underlying the passage of the statute in question are fully stated with approval and supported by the citation of several authorities in *Fertilizer Works v. Aiken*, 175 N. C., 398. We need not repeat here what has so recently been said in that opinion. There is nothing in the act which impairs the right of contract, and we think it is constitutional. *Fertilizing Co. v. Thomas,* 181 N. C., 274.

Affirmed.

L. P. TYREE, ADMINISTRATOR, v. GEORGE C. TUDOR ET AL.

(Filed 19 April, 1922.)

1. **Automobiles—Negligence—Principal and Agent—Father and Son—Recklessness of Driver—Notice to Owner—Evidence.**

   Where the owner of an automobile has authorized his 16-year-old son to drive therein a young girl of about the same age to a dance in the country, and there is evidence that his reckless driving has proximately caused her death, further evidence that the son had recently thereto been convicted of reckless driving in police courts, and that the father had arranged his fine, and also the reckless driving of the son on the occasion of the death, are competent as tending to show that the father had full notice of the recklessness of the son in driving automobiles, and of his own actionable negligence in permitting his son to use his automobile at the time in question.

2. **Automobiles — Negligence — Contributory Negligence — Evidence — Guests.**

   Where a young girl, something less than 16 years of age, has been killed by the reckless driving of her escort, about the same age, in returning at night from a dance, when the latter was intoxicated and racing with others on the country improved highway, striking another car and deflecting his own, while going about sixty miles an hour, through a wire fence, taking down several posts and throwing his car bottom upwards in a field, the previously expressed desire of the deceased to return at a fast speed and her desire to get home before her friend who was staying with her, so that her mother would not suppose she was riding after the dance had ended, is not sufficient to sustain the defense of contributory negligence, or bar the plaintiff's right of recovery.

3. **Same—Acquiescence.**

   For a young girl riding in an automobile as a guest to have imputed to her the negligence of the driver, upon the issue of contributory negligence, there must be sufficient evidence that she had control over the machine or over the acts of the driver, and her acquiescence in the method or manner of his driving is not alone sufficient.

4. **Negligence—Contributory Negligence—Burden of Proof.**

   The burden of proof of contributory negligence is upon the defendant relying thereon, and on this trial: *Held*, the evidence was insufficient.

5. **Appeal and Error—Verdict—Damages.**

   The amount of the verdict for damages for the negligent killing of the plaintiff's intestate is not reviewable on appeal.

STACY, J., dissenting.

APPEAL by defendants from *Long, J.*, at September Term, 1921, of FORSYTH.

This case was before the Court, 181 N. C., 215, where the facts are fully stated.

Bynum Tudor, son of the defendant George C. Tudor, at the time the plaintiff's intestate was killed in the automobile wreck, was something over 16 years of age, living with his father under his care and custody. The father was the owner of two automobiles, kept on his premises, and which he permitted his son to drive at his pleasure, sometimes alone and at other times with the family.

On 19 June, 1918, at a dance for young people at the Country Club on the concrete road three miles west of Winston, Bynum Tudor invited Ruth Tyree, the plaintiff's intestate, a young girl something under 16 years of age, to go to the dance with him. It is admitted, and was in evidence, that he first asked his father for the large car (which was the Hudson touring car), but his father directed him to take the Buick Six roadster, which was a small car owned by his father. Just before going to the dance liquor was secured by George Tudor, an elder brother of Bynum, who was also a minor in the home of his father, which was placed in the Buick roadster. On the night prior to the dance a quart of liquor was in the office of the father, George C. Tudor, and his son, George C. Tudor, Jr., stated that it was for the dance. Drinks were given from this liquor to other young men before they went to the dance, and also after their arrival at the dance Bynum Tudor, who was handing the liquor around to the boys, and his brother put some of the liquor in the punch bowl prepared by chaperones for the young people to drink, and when, during the progress of the dance, Bynum Tudor was requested by one of his friends to walk across the floor he gave as an excuse that he was too dizzy.

It is also in evidence that just prior to going to the dance, and while the young men were assembling at the drug store, Bynum Tudor, who had purchased bottles to put the liquor in, hearing an automobile backing out of an alley, made the statement that "If they outrun me tonight, damn if they have not got to go some." After the liquor at his father's house had been secured and put in the automobile, and while the young people were assembling at the drug store, Bynum Tudor driving his car along the street saw one of the young men, to whom he called, "I have got it," and taking the young man down on a back street he gave him a drink from the liquor in the car. With the liquor stored away in the automobile, he called at the home of Miss Ruth Tyree and carried her from her father's home to the dance at the Country Club. Her remains, torn, bruised, and lifeless, were brought back to this home the next day.

During the progress of the dance Bynum Tudor, who did not dance, was racing up and down the road extending from Winston to the Country Club at a speed estimated at from 50 to 60 miles an hour, sometimes racing other automobiles and sometimes motorcycles.

It is also in evidence that about a month prior to this time Bynum Tudor, driving this same car, was racing with other cars along the road from the Country Club to Winston; that two weeks prior to this time he had been indicted in Greensboro for violation of the automobile law, and his father had compromised the indictment; that on Sunday, two days prior to this action, he again violated the automobile law by reckless driving on the street in Winston, and had been tried the following day in the police courts, and his father had paid the fine, and the very next night his father had permitted him to take the car with this young girl in it to the dance.

It is further in evidence that this dance lasted until about 1 a. m., and Bynum Tudor was one of the last to leave. In this Buick roadster, besides himself as chauffeur, was his older brother George, also a minor, and Miss Ruth Tyree. Another one of the young girls attending the dance testified that just before they started to leave for Winston she came to the car to speak to Ruth Tyree and found the fumes of liquor on him so strong that she shuddered and drew back. Bynum started back to Winston driving the car at a speed estimated by witnesses as between 50 and 60 miles per hour, with the sparks flying out from the manifold 7 or 8 inches long, passing car after car on this crowded thoroughfare, which was filled with cars coming back to the city, and in a race with Finley Horton, who immediately preceded him to the city, with whom he had made an agreement just before leaving the club to have a race. As the Tudor car approached Lovers' Lane, which was a public road extending from the Country Club, and immediately behind the high-powered car driven by Fin Horton in this race, Bynum turned too quickly in passing Martin Goodman's car striking the hub caps on the front wheel on the Goodman car, side-swiping and bending straight the bumper of that car. The Tudor car with its occupants was hurled over a barbed wire fence into an adjoining field, the car upside down, himself and brother severely injured, and with the almost lifeless body of Miss Tyree terribly disfigured hanging on the barbed wire fence. The speed at which he was running when he side-swiped the Goodman car was such that his car cut off 4 locust posts 4 to 6 inches in diameter as it was hurled into the field. The almost lifeless body of Miss Tyree hanging on the strands of the barbed wire fence, was in such a mangled condition that one of the young men fainted in attempting to remove it, and when taken to the hospital, where she died almost immediately, her body was in such a horrible condition that the hospital authorities would not permit her parents to see it.

The road was an improved highway, 50 feet wide, of which 20 feet in the center was concrete and 15 feet on each side, where the accident occurred, was a dirt road. Martin Goodman was driving on the right-hand side of the road and on the concrete near the edge. The Tudor car came up from behind without blowing the horn or giving any signal of its approach, and when it struck the Goodman car was running approximately 60 miles an hour.

Upon this record the jury answered the issues in favor of the plaintiff, and assessed the damages at $15,000. Judgment and appeal by defendants.

O. O. Efird, Jones & Clement, and Swink & Hutchins for plaintiff.
Manly, Hendren & Womble, Parrish & Deal, and Holton & Holton for defendants.

CLARK, C. J. This case was before us, 181 N. C., 215, upon facts substantially the same as in this appeal, and the Court held in an unanimous opinion that "Where the owner of an automobile has his son to operate it as his chauffeur, both for business purposes and for the comfort and pleasure of his family, and there is evidence that he has given his permission for that son, just over 16 years of age, to use it in escorting the plaintiff's intestate, a young girl of about the same age, to a dance, it is sufficient, upon the question of the agency of the son, to bind the father for negligence which proximately caused the death of the plaintiff's intestate when returning from the dance in the automobile"; also, that "It was the duty of the father not to entrust the safety of the young girl to his son unless he knew that he was careful and prudent in the operation of the machine, and he is responsible in damages for the death of the plaintiff's intestate proximately caused by his son's negligence in driving the machine while acting as an escort."

On this second trial, the evidence was much strengthened for the plaintiff by the testimony that about a month prior to the time of this occurrence the chauffeur, Bynum Tudor, had been driving this same car, racing with other cars along this same road between the Country Club and Winston-Salem; that two weeks prior to this time he had been indicted in Greensboro for violation of the automobile law, and his father, George C. Tudor, the defendant, had arranged the indictment; that on Sunday, two days prior to this occurrence, this 16-year-old son had violated the automobile laws by reckless driving on a street in Winston, and on the following day had been tried in the police court and his father, the defendant, had paid the fine. This was the very day before this lamentable occurrence. The father, therefore, had full notice of the reckless character of his son as a chauffeur, and his unfitness to be trusted in charge of an automobile, especially on an occasion of this kind involving the safety and life of a young girl.

There was, besides, on this trial, evidence of liquor being in the car, its distribution by the chauffeur and his older brother, also in the car, and the defendant's brief stresses the evidence that the chauffeur himself (though denied by him under oath) on that occasion was drinking, if not intoxicated. There was much evidence, uncontradicted, of the disregard of the law, not only in reckless driving and speeding far in excess of that forbidden by law, but according to the brief of defendant's counsel, of a violation of law against driving an automobile while being intoxicated. For these acts of negligence the defendant was responsible both for having placed his son in charge of the car and by reason of his liability for the negligence of his agent.

The plea of contributory negligence is thus set out: "Said Bynum Tudor undertook to pass one or more of said cars and to reach the home of plaintiff's intestate in advance of her guest, and that the rate of speed at which he was driving and his effort to pass cars were due entirely to the request of plaintiff's intestate; and the said plaintiff's intestate at all times acquiesced in and approved the method and manner of driving of Bynum Tudor, and these defendants plead as contributory negligence in bar of plaintiff's recovery the aforesaid acts and conduct of plaintiff's intestate."

It is not alleged, nor is there any proof tending to show that the unfortunate victim of this accident was an employee, or had any control whatever, or attempted to exercise, by any act, any control whatever over the operation of the car. The burden was upon the defendants to sustain the plea of contributory negligence by the greater weight of the testimony, and there is a want of any evidence sufficient to be considered by the jury, who, however, have negatived it. C. S., 523; *Cogdell v. R. R.*, 132 N. C., 855 (*Walker, J.*); *Watson v. Farmer*, 141 N. C., 454; *Wright v. R. R.*, 155 N. C., 329 (*Allen, J.*). The only proof offered was the testimony of George C. Tudor, Jr., the brother of the chauffeur, that on the way home Ruth Tyree asked Bynum Tudor to "get her home in a hurry in order to get there before Miss McKinsey, because if she did not get home before Miss McKinsey did her mother would think she had been riding after the close of the dance." This was properly excluded by the judge. It did not show any control of the car, or any request for an excessive speed, or tend to show that the request was the proximate cause of the death of this young girl. It was a perfectly reasonable request, and was not competent in any way to support the charge that the deceased was responsible or that the remark caused the occurrence.

But it is said that the following evidence, which was admitted by the court, should have that effect: Govan Caldwell testified that about three-quarters of an hour before leaving the Country Club for home, while the witness and Bynum were talking in the presence of Ruth Tyree about having a race with John Casper at a very rapid rate of speed, "Ruth said she wanted to go as fast as they had been going." Bynum said, "Let's go now," to which she answered, "No, let's wait until we go home," and Bynum replied that he would run as fast as she wanted to.

That remark, which was no part of the *res gestæ, Barker v. In. Co.,* 163 N. C., 175, though the judge admitted it, and the excluded testimony that while in the car on the way home she requested Bynum to "get her home in a hurry, to get there before Miss McKinsey did, otherwise her mother would think she had been riding after the close of the dance," is all the evidence offered to place upon the head of this young girl the responsibility of being the cause of this terrible disaster! Neither the plea nor the evidence would have justified the jury to come to such a conclusion. To his credit, the boy himself did not on his oath make such assertion. On the contrary, in his testimony he swore frankly, "When I left the Country Club the reason I had for driving at the rate of speed I did was that I was going home. I wanted to pass another car—the car Miss McKinsey was in. I passed 3 or 4 cars to the best of my knowledge before I came to the Goodman car." He did not try to put the blame on the girl, but like a man said he drove fast because he wanted to pass another car.

There is no evidence that Bynum Tudor knew what car Miss McKinsey was in, and the mere request by Ruth Tyree "to get her home in a hurry" did not license Bynum Tudor to drive at the terrific speed which was a violation of law. Besides, Fin Horton testified that he and Bynum had made an agreement to race back home and Bynum had offered to bet $5 on the result.

The jury found upon the issues submitted that: (1) The plaintiff's intestate was killed by the negligence of the defendant Bynum Tudor, as alleged in the complaint; (2) that Bynum Tudor was the agent or servant of the defendant George C. Tudor at the time mentioned in the complaint; (3) that the plaintiff's intestate did not contribute to her death by her own negligence, as alleged in the answer; and assessed the damages.

The very able counsel for the defense have presented every possible exception, but we do not consider it necessary to elaborate and discuss more fully the contentions presented.

The evidence offered as to the conduct and record of Bynum on that occasion and before was not to show his general reputation or character, but that he was a reckless driver and, taken in connection with other evidence, was proof that his father knew or should have known it. In *Linville v. Nissen,* 162 N. C., 100, it is held that the father would be liable for entrusting an automobile to his son if the father knew that the son was reckless and incompetent.

The evidence of negligence of the defendant is practically uncontradicted and the reliance of the defendants is upon the defense of contributory negligence. Notwithstanding that Bynum and his brother both testified that Bynum did not drink anything on that occasion, the brief of the defendant strenuously insists that he was intoxicated, and that the young girl was guilty of contributory negligence in that she did not know this (for there was no evidence that she did), and did not get out of the car, which was one of the last to leave, at one o'clock in the morning, three miles from home, and the defendant's brief further stressed the proposition that she was guilty of contributory negligence in view of his fast driving because she did not get out of the car (running at times 60 miles an hour), and, therefore, she and not the defendants is responsible for her death. In *Hunt v. R. R.*, 170 N. C., 442, the Court said: "It is held by the greater weight of authority that negligence on the part of the driver of an automobile will not, as a rule, be imputed to another occupant or passenger unless such other occupant is the owner or has some kind of control over the driver. This is undoubtedly the view prevailing in this State. See the learned opinion on this subject by *Douglas, J.*, in *Duval v. R. R.*, 134 N. C., 331, citing *Crampton v. Ivie,* 126 N. C., 894; both of these discussions being approved in the more recent case of *Baker v. R. R.*, 144 N. C., 37. See, also, *Bagwell v. R. R.,* 167 N. C., 611; *McMillan v. R. R.,* 172 N. C., 853." This was quoted with approval in the very recent case of *Pusey v. R. R.*, 181 N. C., 142.

In that case the defendant requested an instruction that the plaintiff should have remonstrated with the chauffeur if he was driving too fast and have declined to go with him if the driver was drinking, and if he did not it was contributory negligence. But the Court held that it was not error to refuse such instruction because "Pusey was a guest riding for the pleasure of the trip and had no control over the car and nothing to do with driving it."

It has been repeatedly held that for a person to be responsible for the operation of an automobile, he must be the owner of the car which is operated by some one under his authority and permission, or he must have control of the operation of the car, neither of which functions could be attributed to Ruth Tyree, who was a mere guest in the car which was entirely under the control of Bynum Tudor under the authority and by the permission of his father. The above proposition is sustained by unbroken authority in this State. Among other cases are *Linville v. Nissen,* 162 N. C., 95; *Taylor v. Stewart*, 172 N. C., 203; *Williams v. Blue*, 173 N. C., 452; *Clark v. Sweaney*, 175 N. C., 282; *Wilson v. Polk,* 175 N. C., 490.

In *Williams v. Blue, supra,* the Court said: "If it should turn out upon the trial that defendant Fannie A. Blue was exercising no control over the machine or chauffeur and was occupying it simply as the wife of John Blue and with his consent, then she would not be liable. As to the defendant Graham, . . . if it should turn out upon the trial that he did not assist in directing the operation and course of the machine at the time of the collision, he would not be liable."

Among the later cases affirming this uniform doctrine of our courts is *Parker v. R. R.,* 181 N. C., 103, where, sustaining a verdict of $45,000 for damages sustained by a lady riding in her sister's automobile where the same defense of contributory negligence was set up, the Court said: "As to the contributory negligence, the burden of which was upon the defendants, the plaintiff was not driving the automobile, but was only a guest or passenger in the car. There is no evidence that she had any control over the movements of the car, and the negligence of the driver, if there was any, cannot be imputed to the passenger," citing numerous authorities.

In 2 R. C. L., 207, it is said: "The prevailing view is that where the occupant has no control over the driver, even in a case where the relation of carrier and passenger does not exist, the doctrine of imputed negligence does not apply."

In view of the negligence of the father in entrusting this machine and the custody of the young daughter of a neighbor to the care of a reckless and incompetent driver, as he knew his son to be, having but recently twice obtained his discharge from the law for reckless driving, once on the very day before, and in view of the overwhelming evidence of the chauffeur's reckless conduct and violation of law on this and previous occasions, it cannot be maintained seriously that the remark of the girl in a casual conversation three-quarters of an hour before leaving in the car that she would like fast driving (but which she declined at that time), and the offered testimony, which was properly excluded, that on the way home she said she wanted the chauffeur to get home ahead of a certain other car—that these remarks were the proximate cause that this car, running perhaps 60 miles an hour, was catapulted 36 feet, by striking another car, cutting down 4 locust posts 4 to 6 inches in diameter, seriously injuring both the young men, destroying the car, and ruthlessly extinguishing the life of this bright young girl, whose safety had been entrusted to their care. This defense that "*the woman and not the man*" was to blame has been often asserted throughout the ages, but never on slighter foundation, not even on that memorable occasion when it was first pleaded by Adam. Genesis, ch. 111:12.

The question of damages was fully discussed before the jury, and under a charge which was properly stated, following the uniform decisions of this Court. *Hill v. R. R.,* 180 N. C., 492, and cases there cited by *Walker, J.*

The amount assessed by the jury is not reviewable by us, *Benton v. R. R.,* 122 N. C., 1009; *Cook v. Hospital,* 168 N. C., 256, and if it were we could not say that the verdict of $15,000 for the untimely death of a young girl of about 16 years of age, who was shown to possess good health, an excellent character, and more than usual ability, was excessive compensation for her death, under most distressing and painful circumstances caused by most inexcusable negligence on the part of the father and criminal negligence on the part of the son, to whose protection and care she had been confidingly entrusted by her relatives.

No error.

STACY, J., dissenting: There are several propositions of law, laid down in the opinion of the Court, with which I do not find myself in accord; and, hence, I am constrained to state briefly the reasons for my dissent.

At the outset it should be observed that the sufficiency of the plea of contributory negligence is challenged, for the first time, in the opinion of the Court. At no stage of the case, either here or below, has it been questioned by any of the parties. Furthermore, giving a liberal construction to the allegations of the answer, which we are required to do under C. S., 535, I think the plea is fully adequate and entirely sufficient. *Brewer v. Wynne*, 154 N. C., 471; *McNinch v. Trust Co., ante*, 33.

"The uniform rule prevailing under our present system is that, for the purpose of ascertaining the meaning and determining the effect of a pleading, its allegations shall be liberally construed, with a view to substantial justice between the parties. This does not mean that a pleading shall be construed to say what it does not, but that if it can be seen from its general scope that a party has a cause of action or defense, though imperfectly alleged, the fact that it has not been stated with technical accuracy or precision will not be so taken against him as to deprive him of it. *Buie v. Brown*, 104 N. C., 335. As a corollary of this rule, therefore, it may be said that a complaint cannot be overthrown by a demurrer unless it be wholly insufficient. If in any portion of it, or to any extent, it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, the pleading will stand, however inartificially it may have been drawn, or however uncertain, defective, or redundant may be its statements, for, contrary to the common-law rule, every reasonable intendment and presumption must be made in favor of the pleader. It must be fatally defective before it will be rejected as insufficient." *Blackmore v. Winders*, 144 N. C., 212.

Suppose a pedestrian upon the highway had been injured by this ill-fated car and Ruth Tyree had not been killed, can it be said and successfully maintained that she could not have been held responsible, along with the driver, for such injury, when the speed of the car at the time was "due entirely to her request"? *Clark v. Sweaney*, 175 N. C., 280;

White v. Realty Co., 182 N. C., 536. This is the substance of the defendants' allegation of contributory negligence; and, if it be sufficient to render her liable in the supposed case, it ought to suffice as a plea in bar of the plaintiff's right to recover here. C. S., 523, and cases cited thereunder. So much for the sufficiency of the plea. I regard the present decision of the Court unfortunate in this respect. It will rise up to trouble us in the future.

I am also of the opinion that the evidence offered by the defendants, tending to support their plea of contributory negligence, was competent and should have been admitted by his Honor below. Its weight and credibility, of course, were matters for the consideration of the jury, and not for the Court. *Loggins v. Utilities Co.*, 181 N. C., 227. The books are full of cases sustaining recoveries where the evidence of negligence was not anything like as strong as that offered to show the contributory negligence of the deceased in the case at bar. I do not say the evidence would or should have been accepted by the jury as true, but it was entirely competent, and it was error in the court below not to have submitted it to the jury for its consideration.

It is stated in the opinion of the Court that "Gowan Caldwell testified that about three-quarters of an hour before leaving the Country Club for home, while the witness and Bynum were talking in the presence of Ruth Tyree about having a race with John Casper at a very rapid rate of speed, 'Ruth said she wanted to go as fast as they had been going,' Bynum said, 'Let's go now,' to which she answered, 'No, let's wait until we go home,' and Bynum replied that he would run as fast as she wanted to." I do not so understand the record. This evidence was excluded. The witness was permitted to give the above testimony, in the absence of the jury, and not in its presence, and this only for the purpose of incorporating it in the statement of case on appeal. No witness was allowed to testify, in the presence of the jury, as to anything said by the deceased while at the Country Club, or just before the fatal accident. All statements made by her, relating to how fast she wanted to ride or why she wanted to go at a rapid rate of speed, were carefully excluded. This evidence, as offered by the defendants, went to the very heart of their plea of contributory negligence, and it must be competent. That which is logically relevant is legally relevant, unless excluded by statutory enactment or some rule of evidence; and none has been shown here. It happens, in many cases, that the very fact in controversy is whether certain words were spoken and not whether they are true or false; and this is our case. "The law may be regarded as settled that wherever, for any reason, an extrajudicial statement is constituently relevant by reason of its bare existence, proof of it will be received." Chamberlayne on Evidence, sec. 2595; *Means v. R. R.*, 124 N. C., 574.

All statements made by the decedent a short time before starting on the fatal ride, and all utterances made by her while in the car and only a moment or so before the accident, were excluded, though the defendants offered to prove them by disinterested witnesses and persons not parties to the action. The defendants offered to show by the witness Gowan Caldwell that decedent, while at the Country Club, said she wanted to run at the same rate of speed that Bynum Tudor had been racing, to which Bynum replied: "Let's go now," and to which she said, "Let's wait until we go home." Also, they offered to prove the following by the witness Phil Cranford: "We returned from racing with John Casper, and something was said about going 60 miles per hour, and Miss Ruth said she wanted to drive 60 miles per hour, and Bynum said: 'Let's go now,' and she says, 'No, wait until we start home,' and Bynum says: 'All right.' Also, defendants offered to prove by the witness George Tudor, Jr., the following: 'Soon after leaving the Country Club she requested that Bynum get her home in a hurry in order to get home before Miss McKinsey did because if she didn't get home before Miss McKinsey did her mother would think she had been riding after the close of the dance.' "

This evidence was offered to establish the allegation of contributory negligence to the effect that Bynum Tudor's manner and method of driving the car was attributable to the direction and request of the decedent.

It was stated on the argument that his Honor excluded this evidence under authority of *Dowell v. Raleigh*, 173 N. C., 197; but, to my mind, the instant ruling is not supported by what was said in that case. There plaintiff's intestate was driving a wagon along a rough street in the city of Raleigh. The king-pin broke, throwing the wagon and driver to the ground and instantly causing his death. The question was whether the defective condition of the street or the defective condition of the wagon was the proximate cause of the injury. The trial court received evidence that decedent had said the king-pin was in a defective condition. This Court held that such declaration was inadmissible, *as an admission*, because it was not made by a party to the action or by one in privity with him, or as a declaration against interest since decedent, before the accident, had no interest to serve or to disserve.

In the *Dowell case, supra*, in effect, decedent said: "My wagon is defective." In this case decedent in effect said: "Wait until we go home to drive 60 miles per hour," and "Get me home in a hurry ahead of my guest." The Dowell utterance contained a statement of fact, while the Tyree utterance contained no statement of fact, but was, in form, a request or an entreaty. The Dowell utterance was offered to prove the truth of the matter asserted in it; the Tyree utterance was offered as itself constituting a fact in issue. The Dowell utterance was offered as evidence of an independent fact; the Tyree utterance was offered as the fact itself and not as an admission or declaration against interest, nor as evidence of an unrelated fact. Herein lies the distinction; and it seems to me that the excluded evidence in the instant case was clearly competent.

The request of decedent, made after she and the defendant had started on their trip home and immediately before the accident, is competent for another reason. This was a part of the *res gestæ* in that it was so closely related to the accident as to form a part of its details. In the *Dowell case, supra,* the Court stated that on an examination of the cases apparently opposite it would be found that they were put upon the principle (or largely influenced by it), that the declarations, by reason of the fact that they were made at the very time of the injury, or of their being concomitant therewith in some degree, and explanatory thereof, became *pars rei gestæ.* The instant utterance or request, made, as it was, from one to three minutes before the accident, and bearing directly upon it, should have been admitted as part of the *res gestæ.*

It is stated in the opinion of the Court that Bynum Tudor did not testify that he was speeding at the request of the deceased. How could he, when his Honor had ruled that all statements made by her were incompetent? He alleges it in his answer, and made every effort to establish it by disinterested witnesses. What more could he do?

Again, in fairness to the defendants, I think it should be said that while there is some evidence tending to show that Bynum Tudor was drinking on the occasion in question, the overwhelming weight of the testimony is that he was not. It is to be regretted, however, that according to his own admission he has taken several drinks recently. This, no doubt, weakened his testimony before the jury. But it is not my province to lecture or to criticise; I am only stating both sides of the question. It also appears in the statement of the case that Bynum Tudor was racing back to the city with Fin Horton. I think this, too, is a misapprehension of the record.

In the recent case of *Langley v. Southern Ry. Co.* (S. C.), 101 S. E., 286, it was held that where an automobile driver in driving an automobile to a depot, heeded the directions of occupants who wanted to board a train, the management of the automobile was the concurrent act of driver and occupants, and the negligence of the driver in driving at excessive speed was imputed to an occupant precluding recovery from the railroad for injuries at crossing. The Court said: "The evidence is undisputed that plaintiff's wishes as to speed were respected and obeyed. Clearly, therefore, the evidence was susceptible of the inference that she was responsible for the rate of speed at which the automobile was being run. It matters not whether she had the 'right' to control the driver, since it is not disputed that she did in fact control him."

In 20 R. C. L., p. 165, it is stated: "One riding in a car driven by another, though a mere guest and having no control over the person driving the car may be guilty of such negligence as to preclude a recovery for a personal injury resulting from negligent operation of the car, *e. g.,* if the driver, from intoxication, is in a condition which renders him incapable of operating the car with proper diligence and skill, and this fact is known or palpably apparent to one entering the car, entering or remaining in it, may be held negligence on the part of the guest; and, likewise, a guest may be held negligent who consents to stay in an automobile when the driver attempts to run it after dark without light on an unfamiliar road." *Lynn v. Goodwin,* 170 Cal., 112; L. R. A., 1915 E, 588; *Powell v. Berry,* 145 Ga., 696; L. R. A., 1917 A, 306, and note; *Rebillard v. Minneapolis R. Co.,* 216 Fed., 503; L. R. A., 1915 B, 953.

In the note appearing in Ann. Cas., 1916 E, at 268 *et seq.,* the writer says: "But the courts have declared certain conduct on the part of the occupant to be negligence as a matter of law. Thus it has been held to be negligence on the part of the occupant to fail to remonstrate with the driver when he is engaged in reckless driving. *Jefson v. Crosstown St. Ry.,* 72 Misc., 103; 129 N. Y. S., 233. And it has been held that if the passenger was aware that the operator was carelessly rushing into danger, it was incumbent on him to take proper steps for his own safety, but when the road was strange to the passenger, and there was nothing to make him aware of approaching danger, it could not be said as a matter of law that he was negligent in failing to call the chauffeur's attention to the danger of the situation. *Thompson v. Los Angeles R. Co.,* 165 Cal., 748; 134 Pac., 809. The occupant of an automobile has been held to be guilty of contributory negligence in riding in a motor car on a dark night, without lights, over roads which neither the driver of the car nor any of the persons with him in the car were familiar. *Rebillard v. Minneapolis R. Co.,* 216 Fed., 503; 133 C. C. A., 9; L. R. A., 1915 B, 953.

"Continuing to ride in an automobile after knowledge that the chauffeur is intoxicated, has been held to show independent negligence on the part of the passenger. *Lynn v. Goodwin,* 170 Cal., 112; L. R. A., 1915 E, 588. See, also, *Pittsburg R. Co. v. Kephert* (Ind.), 112 N. E., 251. And in a case wherein it appeared that both the driver and the occupant were drunk, the occupant was held to be guilty of independent negligence. *Cunningham v. Erie R. Co.,* 137 App. Div., 506; 121 N. Y. S., 706."

There was nothing said in the case of *Pusey v. R. R.,* 181 N. C., 137, which militates against the principles announced in the cases above cited. There plaintiff's intestate was killed because of the alleged negligence of the railroad company in maintaining a crossing in a defective or unsafe condition; the defense being that the driver of the automobile in which plaintiff's intestate was riding was driving at an excessive rate of speed, and that plaintiff's intestate was guilty of contributory negligence in failing to remonstrate with the driver and acquiescing in the rate of speed. There was no evidence that the decedent had any control over the car, or had anything to do with the driving of it, nor was there any evidence that the decedent knew that the car was being operated at an excessive rate of speed.

In the case at bar it should be borne in mind that the driver of the automobile was a boy barely sixteen years of age; that decedent was a girl of about the same age; that she was in the high school while he was only in graded school; that she was more mature than he; that a short time before they started home she, with knowledge that he had been driving at that rate of speed, stated she would like to ride sixty miles per hour, and the defendant Bynum Tudor had agreed that on the return trip he would drive at that rate of speed in accordance with her request. Moreover, after they had started home, and only a moment or so before the fatal accident, decedent requested the defendant Bynum Tudor to overtake a car that had departed ahead of them and to get her home before her own guest should reach there.

Although the decedent was not the owner of the car, and was not physically engaged in driving it, at the time of the injury, the above testimony raises a strong inference of fact that the car was being recklessly operated at her request and in accordance with her wishes.

It should also be remembered that the relation of guest and host, which existed here, was the result of an offer on the part of Bynum Tudor to take Miss Tyree to the dance, and her acceptance of that offer. Subsequently that relationship was altered, in a measure, at the request of the guest; the host agreeing to operate the car in a manner agreeable to her wishes and in accordance with her direction. The guest, therefore, by sharing and participating in the running of the car to an appreciable extent, if she really did, necessarily assumed a part of the responsibility for its operation; at least, to my mind, the evidence was sufficient to submit the question of her contributory negligence to the jury.

Contributory negligence, such as will bar a recovery, is the negligent act of a plaintiff, or plaintiff's intestate, which, concurring and cooperating with the negligent act of a defendant, or one acting for him, thereby becomes the proximate cause of the injury, or the cause without which the injury would not have occurred. The same rule of due care, which the defendant, or the one acting for him, is bound to observe, applies equally to the plaintiff or to the plaintiff's intestate; and due care means commensurate care, under the circumstances, when tested by the standard of reasonable prudence and foresight. *O'Dowd v. Newnham* (Ga.), 80 S. E., 40. Such contributory negligence may consist in doing the wrong thing at the time and place in question, or it may result from doing nothing when something should have been done. This is the universal rule.

In answer to the suggestion contained in the majority opinion that the view herein expressed is but an effort to put the blame on "the woman and not the man," I am content to reply in the words of Leviticus (19:15): "Ye shall do no unrighteousness in judgment; thou shalt not respect the person of the poor, nor honor the person of the mighty; but in righteousness shalt thou judge thy neighbor."

Upon the record I think the case should be remanded for a new trial.

WALKER, J., concurring.

CORA L. DORSETT v. F. A. DORSETT.

(Filed 19 April, 1922.)

Husband and Wife—Marriage—Contracts—Services of Wife—Promise to Pay—Quantum Meruit.

For the wife to recover for services rendered to her husband in his business, or outside of her domestic duties, while living together under the marital relation, there must be either an express or an implied promise on his part to pay for them; and the relationship of marriage, nothing else appearing, negatives an implied promise on his part to do so.

APPEAL by plaintiff from *Webb, J.*, at December Term, 1921, of GUILFORD.

This action was brought by the wife to recover of her husband the sum of $5,400 upon a *quantum meruit* for services rendered by her while they were living together as husband and wife. The complaint alleges:

1. That the plaintiff and defendant intermarried 21 July, 1917, in the county of Guilford.

2. That at the time of their marriage the defendant was in the business, in Greensboro, of repairing bicycles, guns, keys, locks, etc., and was doing business on Davie Street in the city of Greensboro, in a house which he rented for that purpose.

3. That in November, 1917, after the plaintiff was married, she went into the said place of business of the defendant, and besides her domestic duties, which she carried on, she rendered service to her husband by waiting on his customers, made keys, worked on bicycles, guns, and other

instruments to be repaired which were brought into the shop, and other kinds of this character of business; that she continued to work for defendant until about 15 November, 1920.

4. That under the laws of North Carolina she is advised that she is entitled to pay for her services rendered the defendant as aforesaid, which were worth the sum of $150 per month for the period of three years from November, 1917, to 15 November, 1920, amounting to $5,400.

Wherefore, the plaintiff demands of the defendant the sum of $5,400 and the costs of this action, to be taxed by the clerk.

The defendant demurred as follows: That it appears from the face of said complaint that said complaint does not state facts sufficient to constitute a cause of action, for that:

1. It appears that at the time when plaintiff alleges she worked for defendant she and the defendant were married, that she was the wife of defendant, and that they were at that time living together as husband and wife.

2. That the complaint shows upon its face that plaintiff's alleged cause of action is upon a *quantum meruit* for alleged services to defendant, her husband, at a time when plaintiff and defendant were living together as husband and wife.

The court sustained the demurrer, and dismissed the action. The only exception is to the judgment assigned.

John A. Barringer for plaintiff.
King, Sapp & King for defendant.

CLARK, C. J. This action is based on C. S., 2513, which is as follows: "The earnings of a married woman by virtue of any contract for her personal services, and any damage for personal injuries or other torts sustained by her can be recovered by her suing alone, and such earnings or recovery shall be her sole and separate property as fully as if she had remained single."

This statute was recently construed in *Kirkpatrick v. Crutchfield,* 178 N. C., 353, in which we said: "It was felt to be unjust and illogical that the husband should recover for labor which the wife had performed *outside the household duties,* and on a contract which she had a legal right to make 'as if single,' and that when the wife had borne the physical and mental suffering of the amputation of her foot and a broken arm and other injuries, compensation should go to her and not to her husband, who had suffered nothing. The discharge of household duties, unending and tiresome, and without limitation of hours, the rearing of children, the loving companionship and attentions of a wife, are full compensation for her right to support from her husband." That case upheld the right of the wife to maintain an action "by virtue of any contract for personal services, and any damages for personal injuries," against a third party. The right of the wife to recover her separate earnings, suing alone, was also sustained by *Adams, J.,* in *Croom v. Lumber Co.,* 182 N. C., 219.

In *Crowell v. Crowell,* 180 N. C., 516, the Court held that the wife "might maintain an action against her husband for an assault or other personal injury, and in such case recover punitive as well as compensatory damages," saying: "Whether a man has laid open his wife's head with a bludgeon, put out her eye, broken her arm, or poisoned her body, he is no longer exempt from liability to her on the ground that he vowed at the altar to 'love, cherish, and protect' her. Civilization and justice have progressed thus far with us, and never again will 'the sun go back ten degrees on the dial of Ahaz.' Isaiah, 38:8." 180 N. C., at p. 524. *Crowell v. Crowell* was reaffirmed, on rehearing, *Stacy, J.,* 181 N. C., 66.

This case presents an entirely new feature. It is not the case of recovery of compensation on a contract against a third party, nor for personal injury against her husband as well as others, but whether she can recover against her husband as upon contract for services rendered without any agreement for compensation.

It may be essential justice, in many cases, that where a wife has rendered services outside the discharge of her household duties that she should receive compensation, and she certainly can do so where there is such agreement with her husband, but in this case there is no such agreement expressed or implied, or even alleged. An implied agreement for compensation always depends upon the surroundings and the conditions attendant upon the rendition of the services.

In *Prince v. McRae,* 84 N. C., 675, the Court said: "Whether the plaintiff's services shall be deemed a gratuity or constitute a claim for compensation must be determined by the understanding of both parties. If they were intended to be and accepted as a gift or act of benevolence, they cannot, at election of plaintiff, create a legal obligation to pay." The general principle of a *quantum meruit* is clearly stated in *Winkler v. Killian,* 141 N. C., 578, in which *Hoke, J.,* said: "It is ordinarily true that where services are rendered by one person for another, which are knowingly and voluntarily accepted without more, the law presumes that such services are given and received in expectation of being paid for, and will imply a promise to pay what they are reasonably worth. This is a rebuttable presumption, for there is no reason why a man cannot give another a day's work as well as any other gift, if the work is done and accepted without expectation of pay." And that case further says that it is equally well established that where a child resides with a parent as a member of the family, "services rendered under such circumstances by the child for the parent are, without more, presumed to be gratuitous, and no promise will be implied and no recovery can be had without proof of an express and valid promise to pay, or facts from which a valid promise to pay is to be reasonably inferred. This last position is usually considered as an exception to the general rule, and in this and most other jurisdictions obtains both as to adult and minor children."

This same reasoning, it seems, should apply with equal if not greater force where the services are rendered by the wife, though outside her household duties, in aiding her husband in the support of the family. It is not usual, certainly, that the wife should receive compensation in such cases, and obligation of payment cannot arise in the absence of an express agreement or such facts and circumstances from which an implied promise will arise, independent of the mere fact that the services were rendered by the wife to the husband outside her household duties.

The general principle as to implied promises to pay as between members of the family has been thus stated: "Where it is shown that a person rendering services was a member of the family of the person served, and received support therein, a presumption of law arises that such services are gratuitous, and, in such cases, before the person rendering the service can recover, the express promise of the party served must be shown, or such facts and services as will authorize the jury to find that there was the expectation by the one of receiving and by the other of making compensation therefor." This has been repeatedly and uniformly held by our courts. Among the numerous cases in point is *Dodson v. McAdams,* 96 N. C., 149, in which it is said: "The presumption against a promise to pay for such labor may be overthrown by an agreement to pay for the same, appearing in terms or when there is proper proof to establish the same." In *Avitt v. Smith,* 120 N. C., 393, the Court said: "In ordinary dealings the law implies a promise to pay for services rendered by one for another. This presumption may be rebutted by the *relations* of the parties, as father and child, stepfather and child, and grandfather and child, etc. In the absence of some express contract, express or implied, showing an intention on the part of one to charge and the other to pay, the presumption is rebutted by the relationship." Cited, *Ellis v. Cox,* 176 N. C., 618; *Stallings v. Ellis,* 136 N. C., 72; *Hicks v. Barnes,* 132 N. C., 150, and other cases.

The principle running through all the cases is nowhere better summed up than by *Walker, J.,* in *Dunn v. Currie,* 141 N. C., 127: "These cases establish the principle that certain relations existing between the parties raise a presumption that no payment was expected for services rendered or support furnished by the one to the other. The presumption standing by itself repels what the law would otherwise imply, that is, a promise to pay for them; but this presumption is not conclusive, and may in its turn be overcome by proof of an agreement to pay, or of facts and circumstances from which the jury may infer that payment was intended by one of the parties and expected by the other."

It is true that in none of our cases was the relationship that of husband and wife, but the principle applies with as full or greater force in such a case as in those which have been presented.

Where the wife has rendered services to a third party, the statute gives her a right to recover her earnings for herself without any participation therein by the husband, and she is also entitled to recover against her husband, or any one else, for injuries sustained; but we have no case holding (and it would be contrary to the principle laid down in the cases we have cited, obtaining as to other relationships in the family) that a wife can recover for services rendered to her husband in the absence of an express agreement or facts and circumstances from which a jury can infer either an express promise or the understanding and intention of the parties that the wife should receive compensation.

There are instances where there is not only a matrimonial partnership between a husband and wife, but a financial or business partnership; also, where the wife is to receive compensation from her husband for services rendered, but in all such cases the business partnership, or the liability of the husband to the wife for compensation, must arise out of an agreement, not out of the marital relation, *ex jure marito*, which, if it extended to business matters, would make each responsible for the debts of the other.

In this case there was not even allegation of such contract, or of an understanding or intention between the parties that the wife should receive compensation.

The judgment sustaining the demurrer is

Affirmed.

DAISY EVANS v. JUNIOR ORDER UNITED AMERICAN MECHANICS ET AL.

(Filed 19 April, 1922.)

1. **Beneficial Associations—Insurance—National Councils—Local Councils—Principal and Agent—Corporations.**

   Where the national council of a fraternal order, authorized by its charter "to establish, maintain, control, and regulate a department for the payment of funeral benefits to the members of the order," operated over an extensive territory through local councils, such local or subordinate councils are agents of the national council for the purposes expressed in its charter.

2. Same—By-laws—Assessments—Forfeiture.

Where the national council of a fraternal order writes funeral benefits through its local councils under the provisions of its charter and by-laws adopted in pursuance thereof, the agency thus created is not affected by the provisions of a by-law of the national council under which the local council forfeits its membership by not remitting assessments collected within stated intervals, as against the rights of the beneficiary under a policy of a deceased member enrolled by the local council, who has died in good standing therein with his assessments duly paid.

3. Issues—Pleadings—Insurance—Good Health.

Where it is alleged in defense to an action to recover of a fraternal order the amount due the beneficiary as a funeral benefit, that at the time of the enrollment of the deceased his health was bad as to certain particulars, which avoided the policy, it is not error for the trial judge to confine the inquiry to the particulars alleged in the answer, and refuse to submit one tendered by the defendant as to the general sound bodily health of the deceased at that time.

4. Evidence—Declarations—Beneficial Associations—Beneficiary.

In an action to recover funeral benefits from a fraternal order, declarations of the deceased as to his health made subsequently to the time of his enrollment, are not admissible as evidence against the beneficiary in his action against the benefit society.

APPEAL by defendants from *Long, J.*, at January Term, 1922, of GUILFORD.

This is an action by the beneficiary to recover upon an insurance (funeral or death benefit) policy in the funeral benefit department of the defendant, the National Council of Junior Order United American Mechanics. The defendant is a corporation, with its principal place of business at Pittsburgh, Pa., and maintains and conducts a funeral benefit department for the purpose of paying funeral benefits to its members. Buffalo Council, No. 202, is a subordinate council of the defendant, and is and has been continuously enrolled in the funeral benefit department thereof since before the plaintiff's intestate, H. Norwood Evans, became a member of said local council. He became a member of said subordinate council several months before his death, which occurred about 23 February, 1920. His dues and assessments for funeral benefits were paid up until the time of his death. He was enrolled in the funeral benefit department of the defendant, and Daisy Evans, the plaintiff in this case, is his widow, and also his dependent, and therefore his beneficiary. From the verdict and judgment in favor of the plaintiff, the defendant appealed.

R. C. Strudwick and N. L. Eure for plaintiff.
Douglass & Douglass and Murray Allen for defendant.

CLARK, C. J. Article VII, section 15, of the constitution of the defendant enumerates the powers reserved to the National Council, and subchapter 26 thereof reads as follows: "To establish, maintain, control, and regulate a department for the payment of funeral benefits to the members of the order."

This is the only section in the constitution of the defendant referring to a funeral benefit department, and is the only section granting to the defendant the right to establish such department. It appears, therefore, that this department was established for the purpose of paying funeral benefits to members of the order, and not for the purpose of reinsuring the subordinate councils. Any by-law attempting to make the defendant a reinsurer only is contrary to this provision of the constitution, and can have no force or effect as against the plaintiff.

Since the funeral benefit department is formed for the express purpose of paying funeral benefits to the members of the order, and as the defendant chooses to do the funeral benefit business through the local councils, it thereby makes the local or subordinate council its agent for the purpose.

In *Bragaw v. Supreme Lodge,* 128 N. C., 360, the Court cited with approval the case of *Schunck v. Geigenseitiger Wittwen und Waisen Fond,* 44 Wis., 375, as follows: "The subordinate lodge acts for and represents the defendant in making the contract with the member, unless we adopt as correct the idea that the member, by some one-sided arrangement, makes a contract with himself through his agent."

Whenever a subordinate council makes application for enrollment in the funeral benefit department, it is required, under Division VIII, section 6, paragraph 3, of the laws of the defendant, to make a pledge as follows: "We have adopted, or hereby agree to adopt upon enrollment of this council in the funeral benefit department, a by-law providing for the payment to the legal dependent of a deceased brother, irrespective of the time of membership of the said brother in this council, the full amount received by his council from the funeral benefit department, less the cost of preparing the claim, and all other charges legally due the council at the time of death."

The foregoing law of the defendant requires the local council to pledge itself that it will act as the agent of the defendant to distribute funeral benefits to members of the order.

Under Division VIII, section 12, of the laws of the defendant, it is attempted to make enrollment of councils in the funeral benefit department optional, but instead of being optional, it is made obligatory upon every council within the State of North Carolina to become enrolled in said department or not to be enrolled in any funeral benefit association at all.

The section reads as follows: "It shall be optional with any council of the Junior Order United American Mechanics to be enrolled in the funeral benefit department as provided herein, but no council of the order shall hereafter be permitted to become members of or connected with any so-called funeral benefit association or organization whose business may be to pay funeral or death benefits, and which is not connected with and controlled by the National Council, Junior Order United American Mechanics of the United States of North America: *Provided,* that the foregoing shall in no wise affect any state death benefit association now in existence whose activities and jurisdiction is now and shall continue to be exclusively confined to such states and limited in its membership to members of the Junior Order United American Mechanics."

To show further that the subordinate council is a part and parcel of the National Council, and that its acts are the acts of the National Council even the property of the local council is held in trust for the National Council, as appears from Division V, chapter 13, section 6, of the laws of the defendant, which reads as follows: "All funds, moneys, and property of whatsoever kind or description accumulated or held by any council of the order, state or subordinate, shall be accumulated and held solely in trust for and as provided by the National Council, and upon the severance of either of said councils from its relations with the National Council by disbanding, withdrawal, expulsion, dissolution, or revocation of its charter, or by its ceasing to exist as a council of the order in any manner, all of said funds, moneys, and property shall immediately thereafter revert to the National or State council as the case may be, to be held by it for the uses and purposes of the order."

The foregoing shows that the local council has absolutely no independence of its own, and must act, if at all, as agent for the National Council, the defendant in this action.

In Division VIII, section 13, of the laws of the National Council, the recording secretary of the local council is expressly made the agent of the defendant for the purpose of sending in the names of members of the local council to be enrolled in the funeral benefit department, and also for the purpose of sending in assessments for funeral benefits to said department. The section reads as follows: "Immediately after the initiation, reinstatement, or admission by card of a member in any council that has already been admitted to the funeral benefit department, if such member possesses the qualifications prescribed in section 8 of these laws, the recording secretary of such council shall forward to the secretary, on blanks provided for that purpose, the name of such member in full, his number upon the roll, his age at last birthday, and his occupation and address, and the recording secretary shall certify that such member is in sound bodily health and free from any disease, together with 35 cents if in Class A, or 70 cents if in Class B, which shall be for the enrollment fee and the assessment of such member for the month in which his name is enrolled in the funeral benefit department, and the secretary shall immediately upon receipt thereof enroll the name of such member on the roll of his council in the funeral benefit department, and beginning with the date of such enrollment and thereafter his council shall be entitled to all benefits thereof."

Relative to the duty of the recording secretary of the subordinate council as to forwarding assessments for members of the funeral benefit department, Division VIII, section 14, of the laws of the defendant reads as follows: Paragraph 1. "On or before the tenth day of each month there shall be paid by each council for each member on its roll in the funeral benefit department on the first day of the current month, a regular monthly assessment as provided by law. It shall be the duty of the recording secretary of each council enrolled in the funeral benefit department to forward such monthly assessment to the secretary on or before the tenth day of each month, using blanks furnished by the secretary for that purpose, and should such payment not reach the office of the secretary by the last day of the month, such council shall thereby, *ipso facto,* be suspended and not entitled to benefits until such suspension shall have been removed."

In *Bragaw v. Supreme Lodge,* above cited, at page 359, it is said: "To invest the secretary with the duties of an agent and to deny his agency is a mere juggling of words. Defendant cannot thus play fast and loose with its own subordinates. Upon its theory the policyholders had absolutely no protection. They were bound to make their monthly payments to the secretary of the section (local lodge), who was bound to remit them to the board of control (Supreme Lodge), but they (the assured) could not compel him to remit, and were thus completely at his mercy."

The Court, in *Bragaw v. Supreme Lodge,* cited above, at top of page 360, cites with approval *Murphy v. Independent Order of Jacob,* 27 So., 624, in which it is held: "Under a by-law of a beneficial association declaring that officers of subordinate lodges shall be agents of the body that elects them, and not of the Grand Lodge, the latter cannot escape liability on a certificate of membership by reason of the failure of the subordinate lodge to do its duty in paying assessments to the Grand Lodge."

See, also, *Carden v. Sons and Daughters of Liberty,* 179 N. C., 399; *Connor v. Odd Fellows, ibid.,* 494; *Hart v. Woodmen,* 181 N. C., 488.

It follows, therefore, that the objection that the defendant is not properly the party defendant cannot be sustained. The by-law that the officers of subordinate lodges shall be agents of the lodge that elects them and not of the defendant, the National Council, cannot avail, for the latter cannot escape liability for the action of the local lodges who are their agents to make the collections and forward to the national lodge the funds out of which the payments are made on these funeral benefit policies.

The National Council is the proper party to pursue in this action. *Gilbert v. Dalton Council,* 25 Ga. App., 131.

The defendant in its answer alleged that the said H. Norwood Evans, when he became a member of Buffalo Council, No. 202, "was not in sound bodily health, but was afflicted and suffering from chronic middle ear trouble and chronic mastoiditis, which had demonstrated itself prior to said initiation and enrollment, and that under the by-laws of the defendant and said subordinate councils, the defendant was not liable." The court submitted the following issue in the exact language of the answer, "Was H. Norwood Evans, at the time he joined Buffalo Council, No. 202, Junior Order United American Mechanics, suffering from chronic middle ear trouble and chronic mastoiditis which had demonstrated itself prior to the initiation of his name in the funeral benefit department of the National Junior Order?" to which the jury answered "No."

The defendant excepted because the issue was not submitted in these words: "Was the said H. N. Evans in sound bodily health at the time he was taken into the order," etc., but the answer set up specifically the particulars in which the health of the said Evans was defective, and it would have been an injustice to the plaintiff to have broadened the issue into a general inquiry as to the general bodily health of the insured. It does not appear that there had been any motion to amend the answer in this respect, and certainly there is no record that such motion was allowed. The defendant selected its battle ground and the issue was fought out in accordance therewith.

Lastly, the defendant excepted because the court excluded depositions as to statements of H. N. Evans made some time subsequent to the enrollment of his name in the funeral benefit department of the National Council, Junior Order.

In 14 R. C. L., p. 1438, sec. 601, in regard to the "Admissions and Declarations of Insured," it is said: "It may be laid down as a general rule established by the weight of authority, that, where the defense in an action on a contract of life insurance is based on the alleged falsity of statements contained in the application, admissions, or declarations of the insured, whether made before or after the policy was issued, are not admissible against the beneficiary, unless they were made at a period not too remote in time from the making of a contract of insurance, and were of such nature as to be a real probative force in determining the truth or falsity of such statements; apparently on the ground that the contract of insurance is between the insurer and the beneficiary; that the insured is not a party to the suit; and that the beneficiary has a vested interest in the policy of which he cannot be deprived by the insured except by some act in violation of the conditions of the policy. Where, however, the declarations of the insured, are a part of the *res gestæ* they are admissible, though their purpose has been limited to showing knowledge and not as evidence of the facts stated. If the declarations relate to the cause of an accident and death, and are a part of the *res gestæ* they are also admissible." After laying this down as a general rule, it is added that some courts have held that the admissions and declarations of the insured are admissible against his beneficiaries in the case of benefit societies because the beneficiary has no vested rights though other courts have held that the same rule applies to such policies as in the case of an ordinary life policy.

In *Taylor v. Grand Lodge* (Minn.), 11 L. R. A. (N. S., 1908), 92, the whole subject is discussed in a very elaborate note, and while there is some conflict on this point evidently the weight of the reasoning and of authority is that the same rule applies as in ordinary life insurance policies, and that admissions of the insured, especially when made after the date of the policy are not competent evidence against the beneficiaries therein. We think his Honor correctly followed the better reason in excluding the testimony offered of admissions by the insured made subsequent to the issuance of the benefit policy.

In Jones on Evidence, sec. 242, it is said: "It is generally held that there is no such privity of interest between an insured person and his beneficiary as to admit the declarations of the former in actions on life insurance policies." Certainly this is almost the unbroken line of decisions as to ordinary life insurance, and we think, as already stated, that while the authorities are divided, in this respect, as to the admissibility of evidence of this kind in actions on benefit policies, that the reason of the thing does not justify any difference as to the admissibility of evidence in the latter case.

There is no controversy as to the amount to be recovered ($500) if the validity of the policy is sustained.

No error.

ROBERT L. SNOW v. HOBART HAWKES.

(Filed 19 April, 1922.)

1. Contempt—Courts.

Contempt of court is not only a willful disregard or disobedience of its orders, but such conduct as tends to bring the authority of the court and the administration of the law into disrepute, or to defeat, impair, or prejudice the rights of witnesses or parties to pending litigation.

2. Same—Common Law—Classification—Statutes.

Contempt of court is classified at common law as direct contempt, or words spoken or acts done in the presence of the court tending to defeat or impair the administration of justice, and consequential or indirect or constructive contempt, having a like tendency, done at a distance, and not in the presence of the court, and is preserved with its distinction by our statute, C. S., 978, 985, in the former of which the offender may be instantly apprehended and dealt with, and in the latter by a rule issued based upon affidavit requiring the suspected party to show cause why he should not be attached; and in either instance the guilty person may be suitably punished.

3. Same—Inherent Powers—Legislative Powers.

The power to punish for either direct or indirect contempt is inherent in the court as necessary to its exercise of its other powers, and is a part of the fundamental law which the Legislature can neither create nor destroy.

4. Same—Jurisdiction—Culminating Effect.

Where a defendant has been liberated on bail by a bond given by himself with his father as surety, in plaintiff's action to recover damages for the seduction of his daughter, and in proceedings as for indirect contempt it is found as a fact by the Superior Court judge hearing the same that the respondent, the defendant's father, meeting the plaintiff in another state, procured his written agreement to have his pending suit dismissed through fear of arrest and imprisonment: *Held*, the act of the respondent in obtaining the writing under illegal duress, was punishable as for indirect contempt of court; and he having submitted to the jurisdiction of the court wherein the action was pending, the unlawful scheme, though originating in another state, was coextensive with the illegal purpose culminating in our court, and there punishable.

APPEAL by respondent from *Long, J.*, at October Term, 1921, of SURRY.

Rule to attach W. A. Hawkes as for contempt.

The plaintiff brought suit against the defendant to recover damages for the seduction of the plaintiff's daughter, and upon proceedings in arrest and bail the defendant executed a bond with his father, W. A. Hawkes, as surety. Later, the plaintiff and W. A. Hawkes happened to meet each other in Hillsville, Va. There W. A. Hawkes compelled the plaintiff by threat of immediate imprisonment (in default of bail) to affix his signature to a withdrawal of, or an agreement to withdraw, his suit against the defendant, then pending in Surry County, N. C. Upon plaintiff's affidavit a rule was served on said W. A. Hawkes to show cause why he should not be attached as for contempt. The respondent answered the rule, and did not question the court's jurisdiction of his person. Several affidavits were filed, and at the hearing his Honor found, in substance, the following facts:

The plaintiff duly instituted the above entitled action in Surry, where the cause arose, and obtained an order for the arrest of the defendant, and the defendant entered into bond in the sum of $5,000 with the respondent as surety. The summons was duly served and the pleadings were regularly filed. After the action had been instituted and while it was pending W. A. Hawkes met the plaintiff in Hillsville and told him that Hawkes and the clerk of the court of Carroll County, Va., had found a bill of indictment pending in the court there charging the plaintiff with burning Hawkes's barn some fifteen years before that time, and that if the plaintiff did not withdraw the suit pending in Surry, Hawkes would have plaintiff arrested before he could leave town. Plaintiff could give no bail at Hillsville, and to avoid arrest and imprisonment he signed the paper referred to purporting to be a receipt or agreement executed in consideration of $10. The plaintiff can neither read nor write, and did not understand the full meaning of the paper. The plaintiff is satisfied that his daughter was debauched by the defendant. W. A. Hawkes for many years has had the general reputation of being a blockader, and now has the general reputation of intimidating witnesses and parties who appear against him and of exerting a demoralizing influence on the entire community in which he lives. His general character is bad.

His Honor further found as a fact that procuring the plaintiff's signature to the paper by the means set out tended by its operation to embarrass and obstruct the due administration of justice in the pending suit, and pronounced judgment, from which the respondent appealed.

J. H. Folger for appellant.
Carter & Carter for appellee.

ADAMS, J. Contempt of court signifies not only a willful disregard or disobedience of its orders, but such conduct as tends to bring the authority of the court and the administration of the law into disrespect or to defeat, impair, or prejudice the rights of witnesses or parties to pending litigation. At common-law contempts were classified as direct and consequential. Direct contempt may be defined as words spoken or acts done in the presence of the court which tend to defeat or obstruct the administration of justice; and consequential, or indirect, or constructive contempt is an act, having like tendency, done at a distance, and not in the presence of the court. The distinction between these classes is preserved in our statute law. Acts punishable for contempt are set out in section 978, and acts punishable as for contempt in section 985 of the Consolidated Statutes. In case of the former the offender may be instantly apprehended and dealt with, but for the latter, ordinarily a rule based upon affidavit is issued requiring the suspected party to show cause why he should not be attached. But in either instance suitable punishment may be administered. In *McCown's case,* 139 N. C., 95, *Walker, J.,* in a learned and comprehensive opinion said, in substance, that the power of the courts to punish for contempt is a part of the fundamental law; that it is not conferred by legislation, being an inherent power which the Legislature can neither create nor destroy; and that it arises from necessity, because it is necessary to the exercise of all other powers. And Blackstone characteristically remarks that the process of attachment for contempt "must necessarily be as ancient as the laws themselves." 4 Bl., 286.

The respondent does not controvert the power of the court to punish for contempt, whether direct or constructive; but to the judgment rendered in the case at bar he interposes two objections. He contends (1) that the act complained of is not punishable as for contempt, and (2) that if it is, the act was done outside the territorial jurisdiction of the court.

As to the first contention, the instant question is whether the means used by the respondent to effect dismissal of the plaintiff's suit tended to impair or prejudice the rights or remedies of the plaintiff, or to defeat the administration of justice. At common law contempt might be committed by treating with disrespect the rules or process of the court, or by perverting such process to the purposes of private malice, extortion, or injustice. 4 Bl., 286. The common-law principle includes any attempt to intimidate or willfully and unlawfully to prevent a person from instituting or defending an action in any court of record. Rapalje on Con., 27 n, 1. To compass the same end our statute in like manner provides that every court of record shall have power to punish as for contempt any person whose unlawful interference with the proceedings in any action shall tend to defeat, impair, impede, or prejudice any party's rights or remedies, and that such power shall extend to all cases where before the statute was enacted attachments and proceedings as for contempt had been adopted and practiced in courts of record for the enforcement of remedies or the protection of rights. C. S., 985, subsecs. 3 and 7. This principle is applied in numerous decisions. It has been held, for example, that a person who presents to the court a fraudulent claim for the payment of money, or willfully interposes a false answer, or decoys a witness or dissuades him from attending the trial, or insults, on account of an adverse verdict, a juror who has been discharged, or willfully does any other act which tends to defeat the rights of any party to a pending action may be punished as for contempt. *In re Fountain,* 182 N. C., 49; *S. v. Moore,* 146 N. C., 653; *In re Young,* 137 N. C., 553; *In re Gorham,* 129 N. C., 481; *Ex parte Toepel,* 102 N. W., 369; *Scott v. State,* 109 Tenn., 390. Here it may be noted that the last paragraph of section 978 is applicable not to constructive but to direct contempt. If the respondent, by the direct application of overpowering physical force, had obtained dismissal of the plaintiff's suit, his act would have been no more effective than intimidation or duress by a threat of imprisonment; and the written agreement procured under duress, although the court was not in session, was unquestionably an act which tended directly to interfere unlawfully with the pending suit, and to impair the remedy and defeat the rights of the plaintiff.

The second objection involves a question of jurisdiction, but in our opinion it cannot avail the respondent. It is true that the plaintiff's signature to the alleged agreement was procured in Virginia, and that the court had no extra-territorial jurisdiction; but since the respondent appeared in court, answered the rule, and made his defense the question of jurisdiction is material only as it relates to the operation and ultimate effect of his wrongful act. It is perfectly obvious that the respondent's paramount object was to secure dismissal of the plaintiff's suit by fraud, deceit, and imposition on the court. The imposition was to be consummated in the county where the action was pending through an unlawful scheme which was intended to be not only continuing, but coextensive with the illegal purpose, and therefore operative in the Superior Court of Surry. The respondent's act is plainly embraced in the provisions of the statute to which we have referred and the mere fact of his absence at the time he put the agency in motion cannot absolve him from the imputation of constructive contempt.

There being no error in the record, his Honor's judgment must be Affirmed.

BERNICE W. SUTTON, BY HIS NEXT FRIEND, GEARGE W. SUTTON, v. MELTON-RHODES COMPANY, INC.

(Filed 19 April, 1922.)

1. Appeal and Error—Objections and Exceptions—Broadside Exceptions.

Exceptions to the admission of evidence on the trial, which is correct in part, without specifying that which is objectionable, are too generally taken to be considered on appeal.

2. Employer and Employee—Master and Servant—Negligence—Safe Appliances—Evidence.

Where the principle requiring an employer to furnish his employee reasonably safe tools and machinery with which to perform his services is involved in the issue as to defendant's negligence in an action to recover damages for a personal injury, evidence as to the machines in other like factories, upon the question of whether the one causing the injury was of as safe a character as those approved and in general use, is competent.

3. Same—Nonsuit—Trials.

Where there is evidence that a machine at which the plaintiff was injured while in the course of his employment was not of the kind as that approved and in general use for the same character of work, and that an imperfection in the machine caused the injury, a motion as of nonsuit is properly denied.

4. Same—Minors—Instruction to Employees—Duty of Employer—Warnings.

The plaintiff, a boy of fifteen years of age, was employed to work at a power-driven machine, and was alleged to have been injury by the negligence of the defendant, of which there was evidence on the trial, and, among other things, that the boy was not instructed by his employer, the defendant, as to its proper operation: *Held*, it was the duty of the defendant to have previously given to plaintiff such warning and instruction as was reasonably required by his youth, inexperience, and want of capacity to enable him, with the exercise of ordinary care, to perform the duties of his employment, under the existing conditions, with reasonable safety to himself.

5. Employer and Employee—Master and Servant—Dangerous Instrumentalities—Duty of Master.

It is the duty of the employer to select a power-driven machine, at which his employee is required to work in the performance of his duties, with reasonable care and prudence as to its safety, and it is actionable negligence where the employer has failed to select one that is reasonably safe for the work to be done, or one that he knew to be defective, or where he should have known it in the exercise of ordinary care, and the defect proximately caused the injury complained of in the employee's action.

6. Same—Contributory Negligence—Questions for Jury—Instructions—Trials.

Where the evidence tends to show that the plaintiff, defendant's employee, has proximately caused the injury alleged by the negligence of the defendant in failing to furnish a reasonably safe machine with which the plaintiff should do dangerous work, the question of the plaintiff's contributory negligence, if pleaded and relied on, is ordinarily for the determination of the jury, under proper instructions from the court.

7. **Instructions—Presumptions—Appeal and Error.**

It will be presumed, on appeal, that the jury have given the charge of the court a fair and reasonable construction, and a charge upon any phase of the case must be examined with its own context, and that of the entire charge, so as to disclose its real meaning and import.

APPEAL by defendant from *Webb, J.*, at September Term, 1921, of GUILFORD.

The infant plaintiff sued *in forma pauperis,* and by his next friend, to recover damages for an injury sustained by him, at the age of 15 years, while operating a moulder in the defendant's wood-working plant, on the ground of the defendant's negligence. His foot was caught in the belt, carried into the pulley, his knee held by a protruding shaft, while the pulley carried the foot on around itself, breaking the bones and forcing them through the flesh. He was in the hospital seven weeks, and since the injury can get around a step or two at a time, using a crutch all the time. The jury answered the issues of negligence and contributory negligence in favor of the plaintiff, and allowed $1,500 as damages. The defendant appealed.

W. P. Bynum, R. C. Strudwick, and S. S. Alderman for plaintiff.
Shuping, Hobbs & Davis and F. P. Hobgood, Jr., for defendant.

WALKER, J. We will consider the exceptions of the defendant according to the order of their statement in the record. The plaintiff undertook to show that the moulding machine at which the plaintiff was injured while at work with it, was not the kind which was approved and in general use in similar mills, and, in order to do so, he offered considerable testimony, some general and some special in character, which is set forth by questions and answers in the case. It is stated that to all of said questions and answers the defendant objected. But in this form, the objection is entirely too general, as the record shows. It was taken to a mass of evidence, each exception referring to a page or more of evidence, some of which is undoubtedly competent. No question or answer was singled out and alleged to be incompetent, nor was any of these objections directed to any specific part of this testimony. Such an exception will not be considered. *Barnhardt v. Smith,* 86 N. C., 473; *S. v. Ledford,* 133 N. C., 714, 722; *Buie v. Kennedy,* 164 N. C., 290, 300. But an examination of this evidence, if objection had been properly taken to it, will disclose that it was both relevant and competent. The plaintiff alleged that the particular machine, at which he was injured while operating the same, was not such as had been approved and was in general use for the purpose to which it was being applied; and, besides, that it was in itself a defective machine, and in a state of disrepair, and that the angled handle to the pressure bar, which ordinarily projected from under the belt and allowed pressure to be applied without coming in contact with, or in dangerous proximity to, the belt, had been broken off and negligently allowed to remain in that condition, leaving a straight bar entirely under the belt and dangerously located so that pressure could not be applied without bringing the foot into contact with, or too near to the moving belt; and further, that the machine was defective and unsafe in that the weight was too light to perform its intended function.

The testimony of the witness referred to in assignment one, as to the kind of moulder in approved and general use and the respect in which the machine causing the injury differed therefrom, was competent. There was no evidence in the record that any machine other than the kind described by the witnesses as being in general and accepted use was used by other mills engaged in the same business.

The evidence objected to under assignments 2 and 3 was that originally the pressure bar had a right-angled projection from under the belt, upon which projection the foot of the operator could be placed to increase pressure without danger of coming in contact with the belt, and that this projection had been broken off prior to the injury and the pressure bar left straight and entirely under the drive belt, so that when pressure was applied to it the operator must insert his foot between the bar and the belt moving just above it. This was, of course, competent and very pertinent to the allegations of the defectiveness and dangerous condition of the machine. The only objection we believe the defendant could have to this evidence is that it tended strongly to prove negligence. That, of course, was not the ground, but as proof of negligence it was competent.

The motion to nonsuit was properly disallowed, as there was sufficient evidence for the jury upon the question of negligence. It was alleged, and there was evidence to show, that the plaintiff was a boy about 15 years old, and without experience in the management and operation of such a machine, which was somewhat complicated and dangerous to one of his age, having no experience or instructions as to how it should be operated without danger to himself, or as to how danger in its operation could be avoided. It was contended by the plaintiff that the machine was defective and unsafe in that the weight on the pressure bar had had the set screw, which should have held it in place on the bar, broken off, and the weight had been negligently tied on with a piece of wire from the scrap pile instead of being properly repaired, and that the defendant knew of this condition through its foreman, Fines.

The question at last was whether the defendant had selected the machine with reasonable care and prudence so as to procure one which had been approved and was in general use, and had used ordinary care to keep it in proper repair, so as to make it reasonably safe for his employee to use it in performing his work, and if the employer knew it was defective, or should have known it, in the exercise of ordinary care, he should have warned the employee of any danger arising therefrom. We held in *Ensley v. Lumber Co.*, 165 N. C., 687, and also in *Dunn v. Lumber Co.*, 172 N. C., 129, that it is the duty of the master to exercise due care in furnishing his servant with a reasonably safe place to work and reasonably safe and proper machines, tools, and appliances with which to do the work, and in the case of youthful or inexperienced employees this further duty rests upon him: Where the master knows, or ought to know, the dangers of the employment, and knows, or ought to know, that the servant, by reason of his immature years or inexperience, is ignorant of or unable to appreciate such danger, it is his duty to give him such instruction and warning as to the dangerous character of the employment as may reasonably enable him to understand its perils. But the mere fact of the servant's minority does not charge the master with the duty to warn and instruct him if he in fact knows and appreciates the dangers of the employment, and generally it is for the jury to determine whether, under all the circumstances, it was incumbent upon the master to give the minor, at the time of his employment or at some time previous to the injury, instructions regarding the dangers of the work, and as to how he could safely perform it. It is the duty of a master who employs a servant in a place of danger to give him such warning and instruction as is reasonably required by his youth, inexperience, and want of capacity, and as will enable him, with the exercise of ordinary care, to perform the duties of his employment with reasonable safety to himself, citing 26 Cyc., 1174-1178; *Turner v. Lumber Co.*, 119 N. C., 387; *Marcus v. Loane*, 133 N. C., 54; *Walter v. Sash and Blind Co.*, 154 N. C., 323; *Fitzgerald v. Furniture Co.*, 131 N. C., 636; *Rolin v. Tobacco Co.*, 141 N. C., 300; *Leathers v. Tobacco Co.*, 144 N. C., 350. See *Holt v. Mfg. Co.*, 177 N. C., 170, and *Marks v. Cotton Mills*, 135 N. C., 287.

There was sufficient evidence in the case to prove that the moulding machine in question was not such as had been approved and was in general use; that it was defective, or out of repair; that plaintiff was inexperienced in its use and operation, and required instruction as to how he should deal with it, and generally that defendant was negligent in performing its legal duty toward him as its employee. As to whether plaintiff was himself negligent, and by his want of ordinary care caused or contributed to his injury, was manifestly a question for the jury under proper instructions from the court. Negligence on his part was not so conclusively shown, if shown at all, as authorized a nonsuit.

The charge of the court presented the case to the jury in all of its material phases, and substantially responded to all of the defendant's prayers for instructions, so far as they should have been given. The real questions in the case were largely those of fact and the few relevant principles were simple in themselves and correctly applied by the court, which fully and accurately stated to the jury the legal duty of the master to use due care in providing the servant with reasonably safe and suitable machinery and a reasonably safe place in which to do his work, the measure of this duty being that he shall use ordinary care in the performance of it. The charge, in this respect, was not at all in conflict with the rule as laid down in *Smith v. R. R.*, 182 N. C., 290, nor do we think the jury could have so seriously misunderstood the charge which was in substantial agreement with *Marks v. Cotton Mills,* 135 N. C., 287, and the other cases we have cited.

The particular instruction as to the youth and the experience of the plaintiff which is criticised by the defendant's counsel, must receive a fair and reasonable construction, such as we must suppose an intelligent and sensible jury would give it, and it must also be examined with its own context and that of the entire charge, so as to disclose its real meaning and import—and thus considered it was a sufficiently accurate statement of the law. Besides, we find that the court in one part of the charge gave full and explicit instructions to the jury as to the law if they found that the plaintiff had sufficient knowledge of the machine and the method of using it, and was apprised of the risk and danger in operating it.

Having considered this case fully, and especially with reference to the assignments of the defendant, no error can be found which should induce us to disturb the judgment.

No error.

B. R. LACY, TREASURER, v. THE FIDELITY BANK OF DURHAM, DURHAM, NORTH CAROLINA.

(Filed 19 April, 1922.)

1. Constitutional Law — Schools — Statutes — Bond Issues — Terms of School—Governmental Agencies—Counties—State-wide Systems of Schools.

The provisions of our Constitution, Art. IX, secs. 1, 2, 3, are mandatory that the Legislature provide by "taxation and otherwise for a general and uniform system of public education, free of charge, to all of the children of the State from six to twenty-one years," etc., and for the continuance of the school term in the various districts for at least six months in each and every year, recognizing the counties of the State and designating them as the governmental agencies through which the Legislature may act in the performance of this duty and in making its measure effective.

2. Same—State Aid to Counties.

Chapter 147, Laws of 1921, passed under the provisions of Article IX of our State Constitution, with a view of providing a special building fund to enable the counties of the State to properly maintain a six-months school term, authorizing and directing the State Treasurer to issue $5,000,000 coupon bonds of the State, sell the same, and from the proceeds advance to the several counties of the State a proportionate amount from time to time for the purpose of enabling such counties to acquire sites, and to provide buildings, equipping, repairing the public school buildings, etc., adequate and necessary to maintain a six-months school, is for the maintenance of a State-wide school system required of the State Government and imposed as a primary duty on the State itself by express provision of the Constitution.

3. Same—Faith and Credit—Election—Vote by the People.

Article V, section 4, of our State Constitution, prohibiting the General Assembly from "lending the credit of the State in aid of any person, association, or corporation, except to aid the completion of railroads unfinished at the time of the adoption of the Constitution, or in which the State has a direct pecuniary interest, unless by a vote of the people," is an inhibition on giving or lending the credit of the State to third persons, individual or corporate, and of the kind contemplated in the provision; and cannot be construed to affect the mandatory provisions of Article IX of the State Constitution as to the maintenance of a State-wide school system by legislative enactment.

4. Constitutional Law—Interpretation.

A constitution must be construed on broad and liberal lines to give effect to the intention of the people who have adopted it, and must be considered as a whole and construed to allow significance to each and every part, if this can be done by fair and reasonable intendment.

5. Same—Schools—Faith and Credit—Election—Vote of Electors.

Our State Constitution, Art. VII, sec. 7, prohibiting counties, etc., or other municipal corporations from contracting debts or levying taxes except for necessary expenses, unless approved by a majority of the qualified voters therein, refers to debts and taxes in furtherance of local measures, and do not extend to the provisions of Article IX, relating to a State-wide statutory measure to enable the various counties to maintain six-months terms of public schools, by borrowing and returning a State fund created for the purpose, and in accordance with the constitutional express recognition of the counties as the governmental units through which the general purpose may be affected.

6. Same—Necessary Expenses.

The principle upon which the incurring of debts, levying of taxes by counties, or other municipal corporations for public schools are not to be regarded as necessary expenses within the meaning of Article VII, section 7, of the Constitution, and requiring the submission of the question to and the approval of the voters before obligations of this kind are valid, relates to cities or towns or special school districts, or to the purpose of providing means for maintaining schools for a longer period than the constitutional term, or to some school in a special locality has no application to a State-wide school system created under a general act passed in pursuance of Article IX of the Constitution.

7. Constitutional Law—Statutes—State System of Schools—Courts—Jurisdiction.

While it is held that chapter 147, Laws of 1921, providing for a bond issue to aid the counties in building and equipping the schoolhouses necessary for the accommodation of the pupils for a six-months term of school, is a reasonable and valid exercise of the legislative power under Article IX of the Constitution, emphasized by C. S., 5758 *et seq.*, passed in pursuance of section 15 thereof, making it an indictable offense where there is a willful failure to attend the public schools, the principle announced does not withdraw from the scrutiny or control of the court cases where the exercise of the legislative authority has been arbitrary and without limit as to the amount; or where the school authorities depart from any and all sense of proportion and enter on a system of extravagant expenditure, clearly amounting to manifest abuse of the powers conferred.

CONTROVERSY without action, determined before *Devin, J.,* at March Term, 1922, of WAKE.

From the facts submitted it appears that the General Assembly, with a view of providing a special building fund to enable the counties of the State to properly maintain a six months school term as required by the Constitution, passed an act, Laws of 1921, ch. 147, in which the State Treasurer was authorized and directed to issue $5,000,000 coupon bonds of the State, sell the same, and from the proceeds advance to the several counties of the State a proportionate amount from time to time for the purpose of enabling such counties to acquire sites and to provide for building, equipping, and repairing the public school buildings, etc., adequate and necessary to properly maintain a six months school, as contemplated and required by Article IX of the Constitution. The reasons and purpose of said enactment being set forth in the preamble as follows:

"Whereas the enrollment of children in the public schools of North Carolina has so greatly increased within the past two years that the entire school plant in a large majority of the counties must be greatly enlarged or rebuilt altogether, and in all counties school buildings are inadequate to provide accommodations for the children now attending; in many cases large numbers of children being crowded into small rooms, too unsanitary for right living, and too small to afford an opportunity for the teachers to give proper instruction to those anxious for an education; and

"Whereas the larger type of community school for the rural districts should be constructed of a more permanent nature, and planned for a larger service in order that the school may serve the community more effectively, the construction of a more permanent type of school building depending in most cases absolutely upon the State's opening a way for the counties to secure funds at a reasonable rate of interest for erecting school buildings sufficient to accommodate the children of school age, and to provide for the normal annual increase; and

"Whereas the smaller towns and consolidated rural districts must pay a high rate of interest on bonds they issue, and often experience much difficulty in disposing of them at par, and often are without adequate machinery for properly handling sinking funds, interest, and retiring the bonds."

The act then provides that the proceeds realized from sale of the bonds in question shall for the purposes indicated be loaned from time to time to the different counties in proportionate amounts, on application of county boards of education, such loans to be made only when approved by the board of county commissioners, and with ultimate approval also of the State Board of Education. Said loans shall be endorsed and secured by the vote or votes of the respective county boards of education, payable in twenty equal annual installments with interest, and at the same rate at which the money is secured by the State on the bond issue provided for. And said board of education shall provide in its May budget for a special tax, denominated the Special Building Fund Tax, sufficient to meet the annual installments payable upon the loans so made, and it is further provided that these loans to the counties shall constitute a lien on any and all school moneys due said counties from any special State appropriation, and on all school moneys raised by taxation in the respective counties or school districts which may have borrowed of this fund from the county commissioners. Under the regulations established by the State Board of Education, pursuant to powers conferred by the Constitution and statutes applicable, before any loan is made from the fund in question, the county board of education and the board of county commissioners are required to make affidavit that the loan applied for is necessary and required to provide a six months school, etc.

There are various other provisions of the statute, looking to the integrity and preservation of this fund and its fair and equitable distribution to the several counties according to their needs, but this seems to be a sufficient statement to a proper apprehension of the questions presented in the record.

Pursuant to the requirements of the law, the State Treasurer has had the bonds in question prepared and has contracted to sell the same to defendant at a satisfactory price, the rate of interest being 4½ per cent, and defendant resists payment on the ground that the act is invalid as in violation of Article V, section 4, of the Constitution, which prohibits the General Assembly from lending the State's credit in aid of any association, person, or corporation except in aid of unfinished roads or of roads in which the State has a direct pecuniary interest, unless the subject shall be submitted to a direct vote of the people and approved "by a majority of those who shall vote thereon." And, second, as in violation of Article VII, section 7, of the Constitution, which prohibits municipal corporations from contracting debts and levying taxes except for necessary expenses, unless approved by a majority of the qualified voters therein.

The court being of opinion that the proposed bond issue would constitute valid obligations of the State, entered judgment that defendant comply with its contract of purchase, and defendant excepted and appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Fuller, Reade & Fuller for defendant.

HOKE, J., after stating the case: Sections 1, 2, and 3 of Article IX of the Constitution, this being the article on Education, are as follows:

"SECTION 1. Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.

"SEC. 2. The General Assembly, at its first session under this Constitution, shall provide by taxation and otherwise for a general and uniform system of public schools, wherein tuition shall be free of charge to all children of the State between the ages of six and twenty-one years. And the children of the white race and the children of the colored race shall be taught in separate public schools; but there shall be no discrimination in favor of or to the prejudice of either race.

"SEC. 3. Each county of the State shall be divided into a convenient number of districts, in which one or more public schools shall be maintained at least six months in every year; and if the commissioners of any county shall fail to comply with the aforesaid requirements of this section, they shall be liable to indictment."

And after making various other provisions in furtherance of the general purpose, the article closes with the following, designated as section 15: "The General Assembly is hereby empowered to enact that every child, of sufficient mental and physical ability, shall attend the public schools during the period between the ages of six and eighteen years, for a term of not less than sixteen months, unless educated by other means."

A proper consideration of the article will clearly disclose that its provisions are mandatory, imposing on the Legislature the duty of providing "by taxation and otherwise for a general and uniform system of public education, free of charge, to all the children of the State from six to twenty-one years," that the school term in the various districts shall continue for at least six months in each and every year, and that the counties of the State are recognized and designated as the governmental agencies through which the Legislature may act in the performance of this duty and in making its measures effective. In various decisions of the Court the importance and imperative nature of these constitutional provisions have been upheld and emphasized. *Board of Education v. Board of Comrs.*, 178 N. C., 305; *Board of Education v. Board of Comrs.*, 174 N. C., 469; *Collie v. Comrs.*, 145 N. C., 170.

Speaking to the subject in the *Granville County case*, wherein it was held that high schools could well be made a part of the public school system, the Court said: "We find nothing in this article of our Constitution or elsewhere, which in terms restricts the public schools of the State to the elementary grades or which establishes any fixed and universal standard as to form, equipment, or curriculum. On the contrary, in view of the prominent placing of the subject in our organic law, the large powers of regulation and control conferred upon our State board, extending at times even to legislation of the subject, the inclusive nature of the terms employed, 'to all the children of the State between the ages of six and twenty-one years of age,' together with the steadfast adherence to this patriotic, beneficent purpose, throughout our entire history, it is manifest that these constitutional provisions were intended to establish a system of public education adequate to the needs of a great and progressive people, affording school facilities of recognized and ever increasing merit to all the children of the State, and to the full extent that our means could afford and intelligent direction accomplish."

And in *Collie v. Comrs., supra*, wherein it was held that this obligation to maintain a six months school (then four) should prevail notwithstanding it required a tax levy over and above the limitations on amount of taxation elsewhere appearing in the Constitution, *Associate Justice Brown*, delivering the principal opinion, said, among other things: "The reasons which induced the people to adopt Article IX are set forth in its first section, and they are so exalted and forcible in their nature that we must assume that there is no article in our organic law which the people regarded as more important to their welfare and prosperity. This conviction is greatly strengthened when we find that the only criminal offense defined and made indictable by the instrument is one created especially to enforce obedience to its specific commands in respect to the establishment of four months schools. In commenting upon this, *Mr.*

Justice Avery well says: 'It is difficult to understand why this wide departure from the usual course was made, unless we interpret it as emphasizing the intent of the framers of the Constitution that the officers held subject to this unusual liability should have power coextensive with their accountability.'"

And in the concurring opinion, *Walker, J.*, said: "It is not for me to say, in construing that instrument, whether its provisions make for the best interest of the people. I must ascertain the will of the people from what they have said—and not from what I think they should have said—not meaning at all to imply that they have not spoken wisely, and truly expressed their intention. If there is a deliberately conceived and carefully stated principle in their Constitution, and one which it is perfectly evident they desired to be clearly understood and rigidly enforced, it is that embraced in sections 1, 2, and 3 of Article IX, in regard to the schooling of the children of the State. They intended that the State should no longer be debased or retarded in its progress by the ignorance of its people. It is plain that those who wrote these sections knew, as any intelligent citizen knows, that the surest way to obtain good government, and to enjoy it, is to know how to appreciate its blessings and to be able to perpetuate it by a proper and intelligent use of it. When it was, therefore, declared that the people must be educated it was just as binding an injunction that the means to that end must be supplied by taxation as it was that the counties or even the State government should be supported."

And these comments are further strengthened by the fact that a recent amendment to our Constitution, providing that the total of the State and county tax on property shall not exceed 15 cents on the $100 value, except when the county property tax is levied for a special purpose, and with the special approval of the General Assembly, contains the exception that the restriction shall not apply to taxes levied for the maintenance of the public schools for the term required by Article IX of the Constitution.

This being the law applicable, we can see no reason against the validity of this proposed bond issue, the purpose being to procure funds to construct the necessary school buildings for the proper maintenance of the six months school term in the various counties of the State. And we are not impressed with the objection that the measure is in violation of section 4, Article V, of the Constitution, whereby the General Assembly is prohibited from "lending the credit of the State in aid of any person, association, or corporation, except to aid the completion of the railroads unfinished at the time of the adoption of the Constitution, or in which the State has a direct pecuniary interest, unless by a vote of the people." That, as its terms import, is an inhibition on giving or lending the credit of the State to third persons, individual or corporate, and of the kind contemplated in the provision, and can have no proper application to a bond issue necessary to the lawful maintenance of a State-wide school system required of the State Government and imposed as a primary duty on the State itself by express provision of the Constitution.

Nor can the second objection of appellant be allowed to prevail, that the statute will impose upon the counties of the State an obligation to repay the amount of money loaned to them, without a vote of the people therein as required by Article VII, section 7, of the Constitution. It is said by a writer of approved merit that a constitution shall be construed on broad and liberal lines, and so as to give effect to the intention of the people who adopted it. Black on Interpretations (3 ed.), pp. 75 and 76. And to that end it is held that the instrument should be considered as a whole and construed so as to allow significance to each and every part of it if this can be done by any fair and reasonable intendment.

Applying the principle, the restrictions contained in this Article VII, section 7, which prohibits counties, cities, and towns, or other municipal corporations, from contracting debts or levying taxes except for necessary expenses unless approved by a majority of the qualified votes therein, must be understood to refer to debts and taxes in furtherance of local measures and do not extend to a State-wide measure of the instant kind, undertaken in obedience to a separate provision of the Constitution, and in which the counties are, as stated, expressly recognized as the governmental units through which the general purpose may be made effective.

The position is presented and clearly approved in principle in the *Collie case, supra.* There and at that time there was, in Article V, section 1, of the Constitution, a limitation on the rate of taxation for general State and county purposes, which at times, and in that instance, operated to prevent the maintenance of the public schools for the constitutional term of four months (since changed to six), and the Court held that in order to harmonize the two provisions and to allow each its proper significance, the general limitation must yield so as to permit a sufficient tax levy to maintain a school for the specified school term expressly required by Article IX of the Constitution. In the various decisions of the Court in which it has held that the incurring of debts, levying of taxes by counties or other municipal corporations were not to be regarded as necessary expenses within the meaning of Article VII, section 7, of the Constitution, they were either cases of cities or towns or special districts, or the purpose was to provide means for maintaining schools longer than the constitutional term, or they were cases of some school in a special locality enacted without any reference to maintaining a State-wide school system for any specified term, and in which the constitutional requirement in question was in no way presented or considered. The distinction between local measures of the kind presented in the decisions referred to and that in the instant case, was foreshadowed in *Comrs. v. State Treasurer,* 174 N. C., at p. 141. That was a case in which it was sought to impose upon the counties of the State the expenses of a strictly localized road system, under the exclusive governance and control of the local authorities. And in answer to the position that the school authorities of the State were advancing aid to local effort the Court said:

"The suggestion that the State extends its aid in offering educational advantages to the people throughout its territory, and that it is at times made effective in certain designated localities, to our minds is not apposite to the question decided in this appeal, and not helpful to its proper solution. That is recognized and dealt with as a State-wide system under the control of general State officers, made imperative by special constitutional provision; and while aid is at times extended to certain localities where need is pressing, and through the agency of local officials, they are acting, as stated, in promotion of the general system and are in fact and truth performing official duties to that end."

And in *Hollowell v. Borden,* 148 N. C., 255, a case where the levy of a school tax for the city of Goldsboro Graded School without a popular vote was disapproved, *Associate Justice Brown,* distinguishing the decision from *Collie's case, supra,* said: "There is nothing in the recent decision of the Court in *Collie v. Comrs.,* 145 N. C., 170, which sustains the idea that our public school system is a necessary municipal expense. On the contrary, the opinion regards the public school system as a State institution, founded on the Constitution and governed and controlled by the General Assembly. In order to reconcile clauses of the Constitution apparently conflicting, we held in that case that the provision for four months school terms was mandatory, and that in order to give effect to it the General Assembly could compel the counties of the State, when necessary, to disregard the limitation upon taxation contained in Article V, section 1."

While we thus uphold the proposed bond issue as being in the reasonable exercise of the powers conferred by the Constitution, it must not be understood that the exercise of these powers is in all cases arbitrary and without limit as to amount. "They shall maintain one or more school terms at least six months in every year" is the requirement of the Constitution, showing that this number must be in reasonable proportion to the need. And if the school authorities, departing from any and all sense of proportion, should enter on a system of extravagant expenditure, clearly amounting to manifest abuse of the powers conferred, their action may well become the subject of judicial scrutiny and control.

But no such condition is presented in this record. On the contrary, there is every reason to believe and know that the preamble of the present statute is well within the facts and in no way exaggerates the need.

A position that is emphasized by the fact that our Legislature, under section 15 of Article IX, has in specified instances made it indictable where there is a willful failure to attend the public schools. C. S., 5758 *et seq.*

It would present, indeed, an incongruous and most deplorable condition if the General Assembly, having thus provided for a compulsory attendance on the public schools, were not allowed to make provision also for adequate and suitable housing for the purpose. And we are of opinion that the proposed bond issue, with the requirement that the loans made to the counties be repaid to the State is throughout a constitutional enactment, and in the reasonable exercise of the powers conferred on the authorities to enable them to properly maintain the public schools of the State.

There is no error, and the judgment of the court holding this a valid indebtedness is

Affirmed.

ANNIE CLEMMONS v. MALISSA JACKSON ET AL.

(Filed 19 April, 1922.)

1. **Trespass—Damages—Equity—Cloud on Title—Actions—Costs—Trials.**

   In an action for trespass and for damages the plaintiff, after trial of issues as to trespass, etc., may not abandon these contentions upon the trial, and have the court consider the action as an equitable one to remove a cloud upon the title, and so avoid the payment of the full amount of the costs incident to the litigated issues.

2. **Same—Pleadings—Issues—Appeal and Error.**

   Where, in an action for trespass and for damages, the plaintiff alleged title to the *locus in quo* under his deed, and the defendant, admitting this paper title, alleged ownership in a part thereof by adverse possession: *Held*, upon the withdrawal of all claims of trespass and the consequent damages, it was error to the defendant's prejudice for the trial judge to regard the action as a suit to remove a cloud upon the plaintiff's title, ignore the issues raised by the pleadings, and tax each party with one-half of the costs.

3. **Costs—Equity—Cloud on Title—Statutes.**

   Where the defendant disclaims title to lands in a suit to remove a cloud thereon, the plaintiff is chargeable with the costs under the express provisions of our statute, C. S., 1743.

APPEAL by defendant from *Connor, J.*, at the Fall Term, 1921, of BRUNSWICK.

The court entered judgment as follows:

"This cause, coming on to be heard before George W. Connor, judge presiding, and plaintiff having in open court announced that she would not ask that an issue as to trespass upon the lands described in the complaint, nor as to damages, be submitted to the jury, and having moved for judgment upon the pleadings that she be decreed the owner of the land described in the complaint, and the court being of the opinion that the allegation of ownership is not denied in the answer:

"It is, therefore, upon motion of Emmett Bellamy, Esq., and Lorenzo Medlin, Esq., attorneys for plaintiff, ordered, considered, adjudged, and decreed that the plaintiff is the owner and is in possession of the land described in the complaint.

"The court further finds that the action as now presented is one for removal of cloud on title, and that defendant now disclaims title to the land described in the complaint; that at a former term of court an order of survey was made without objection, and that said survey was made; that at a subsequent term this cause was tried by a jury, a verdict rendered, and same was set aside by the judge presiding, and a new trial ordered.

"It is now ordered by the court that the costs of this action be paid, one-half by plaintiff and one-half by defendant."

Defendant excepts and appeals.

Emmitt Bellamy and Lorenzo Medlin for plaintiff.
Robert W. Davis and S. L. Dosher for defendants.

HOKE, J. We are unable to find anything in this record to uphold a judgment against defendant for the costs, or any part of it. It appears from a perusal of the pleadings that plaintiff filed his complaint alleging ownership of a specified tract of land, describing same by metes and bounds; that defendants had wrongfully entered on same and cut and removed therefrom timber and timber trees, and were wrongfully attempting to farm said lands to plaintiff's damage $50; that defendants were insolvent, and unless restrained plaintiff's loss would be irreparable; and asked judgment that plaintiff be declared the owner, for $50 damages, and that the defendants be restrained.

Defendants answered, admitting that plaintiff had a deed for "certain lands" from one J. W. Brooks, and denying each and all allegations of wrong and trespass alleged against them, and denying that defendants are insolvent. Defendants further answered and alleged ownership and occupation under claim of right for thirty years of certain described lands, and that defendants lay no claim to any part of the land alleged to belong to plaintiff, except so much thereof as may be included in the deeds under which defendants claim and occupy, as stated.

Upon the issues thus made, and apparently at a former term, a survey was had by order of court, and the issues arising on the pleadings having been submitted to and determined by the jury, the verdict was set aside by the court and a new trial ordered. In this condition of the record the cause coming on for further hearing at the present term, and plaintiff, as appears from his Honor's judgment, having stated that she would not insist on an issue as to trespass or damages, upon such statement his Honor, treating the action as one to remove a cloud from plaintiff's title, entered judgment of ownership in her favor, and that "each party pay one-half of the costs."

Having thus far presented and maintained the position that defendants had wrongfully trespassed upon her property and caused the accrual of the incidental cost in investigation and trial of these litigated issues, plaintiff should not now be allowed to abandon this position and tax the cost incurred to defendants' prejudice without having it in some way properly determined that these defendants have wrongfully resisted her claim. *Starr v. O'Quinn,* 180 N. C., 92; *Brown v. Chemical Co.,* 165 N. C., 421.

It would seem to be a fair interpretation of these pleadings as a whole that defendant avers and intends to aver ownership of so much of plaintiff's claim as may be included in the deeds and occupation of defendants, and disclaims as to the remainder, and on that interpretation an issue is raised as to whether the lands contained in plaintiff's deed cover any of the lands claimed and owned by defendant as set up and described in the answer. If plaintiff desires to suffer a nonsuit on such an issue, she may do so, but in that case she must submit to a judgment of the costs incurred in the action.

Even on the theory that the action may now be properly construed as one to remove a cloud from title, if defendant's answer is to be dealt with as a disclaimer of ownership, and the judgment of his Honor so treats it, in that case the statute applicable, C. S., 1743, expressly provides that the defendant shall not be subjected to costs.

There is error, and this will be certified that the judgment be set aside and the cause further considered.

Error.

R. W. BERRY ET AL. v. HYDE COUNTY LAND AND LUMBER COMPANY.

(Filed 26 April, 1922.)

1. Pleadings—Contracts—Torts—Consistency.

Where the complaint in an action for damages alleges that the defendant wrongfully dug a canal so as to interfere with plaintiff's right of ingress and egress to and from his lands, without providing a passway thereto, and it appears that the defendant had the right to dig the canal under agreement with the plaintiff, which he has set up in his answer, the allegation in the replication that the defendant had failed to construct the road as agreed is not inconsistent with the allegation in the complaint, upon the theory that the former alleged a cause *ex delicto* and the latter *ex contractu*, the alleged tort being founded upon the alleged breach of contract.

2. **Same—Nonsuit—Trials.**

Where there is a variation between the complaint alleging a cause founded upon tort, and a replication alleging it to have arisen *ex contractu*, the former relating to the latter, it is a proper subject for special instruction upon the supporting evidence, and not a valid cause for nonsuit.

3. **Instructions—Contracts—Breach—Damages—Burden of Proof.**

Where there is allegation and evidence of damage to the plaintiff's land and to his crop for the wrongful closing of his ingress and egress to and from his land by the defendant, the burden of proof as to the amount of compensatory damages is upon the plaintiff, though he may be entitled to recover nominal damages for a technical breach of contract, etc., and it is required of the trial judge to charge the law relating to the evidence in the case with clearness and certainty, so that the jury will not be confused or misled, either as to the measure of damages or the burden of proof.

APPEAL by defendant from *Allen, J.*, at July Term, 1921, of HYDE.

Plaintiffs were joint owners of a tract of land containing about 525 acres, bounded on the east by the Gibbs canal and on the north by the Poplar Ridge road. Defendant entered into a written agreement with the plaintiffs by which the defendant acquired the right to enter on plaintiffs' land and to widen, deepen, maintain, and use the canal. Plaintiffs gave their consent "for the closing by the proper legal authorities of Hyde County of the public road known as the 'Poplar Ridge road,' leading from the Juniper Bay road to the eastern line of the canal above mentioned, provided the Juniper Bay road shall be established leading from the point on railroad bed to a road where the railroad bed crosses it along said railroad bed to a point on or near said canal on the Murray farm, and thence on the east side of said canal to the point where the Poplar Ridge road above mentioned now crosses the line of said canal, and which by the terms of this agreement is to be closed." Plaintiffs alleged that defendant wrongfully dug the canal to a depth of 8 feet and extended its width to 40 feet across the Poplar Ridge road and obstructed plaintiffs' right of ingress and egress, without providing a passway to plaintiffs' land; and that defendant has thereby impaired the value of the plaintiffs' land and caused the destruction of their crop. They assess their loss at $6,465. Defendant denied the material allegations of the complaint, and pleaded the contract referred to, and other defenses. Plaintiffs filed a replication alleging a breach of the contract by defendant in failing to construct the road as agreed.

The court submitted four issues, based upon the contract, the defendant's alleged breach, and damages to the plaintiffs' crops and land, and these issues were answered in favor of the plaintiffs. Judgment, and appeal by defendant.

Spencer & Spencer and Clifton Bell for plaintiffs.
Mann & Mann and Small, McLean, Bragaw & Rodman for defendant.

ADAMS, J. The defendant insists that the complaint and the replication are inconsistent; that in the former the cause of action is *ex delicto*, and in the latter *ex contractu;* and that the issues submitted by the court relate, not to the tort, but to the defendant's alleged breach of contract. At the trial the defendant tendered issues drafted upon allegations in tort, and contends here that the plaintiffs have abandoned the cause of action stated in the complaint and now rely solely upon the replication. It is true, as argued by the defendant, that a party may not be allowed in the course of litigation to maintain radically inconsistent positions, or to state one cause of action in the complaint and in the replication another which is entirely inconsistent. C. S., 525; *Lindsey v. Mitchell*, 174 N. C., 458. But in our opinion this principle is not available to the defendant as ground either for a nonsuit or for a new trial. As we understand the contract, the pleadings, and the evidence, particularly the testimony of the defendant's manager, it was in the contemplation of the parties that the defendant should construct or cause to be constructed the road called for in the contract; and the allegation and contention that the defendant wrongfully interfered with the plaintiffs' right of ingress and egress is ultimately dependent on the question whether the defendant complied with its contract as to the construction of the road. In the complaint the plaintiffs allege that the defendant wrongfully increased the width and depth of the canal, and thereby interfered with their right of ingress and egress "without providing plaintiffs with a passway to their land." Since the plaintiffs expressly agreed to the change in the canal, the allegation, when reasonably construed, appears to mean that the defendant interfered with the right of ingress and egress by failing to construct the road described in the contract. In the determination of this ultimate question it is immaterial, so far as the issues are concerned, whether the alleged cause of action be referred to technically as *ex delicto* or *ex contractu*. We think, therefore, that his Honor properly declined to dismiss the action as in case of nonsuit. If there is a variance between the complaint and the replication, such variance may be a proper subject for special instructions, but is not a valid cause for nonsuit. *Edwards v. Erwin*, 148 N. C., 433.

The defendant, however, is entitled to a new trial for error in his Honor's instructions as to the third and fourth issues. The burden upon each of these issues was on the plaintiffs. Even if the answer to the first and second issues entitled the plaintiffs to nominal damages, still upon them rested the burden of showing by the greater weight of the evidence the *quantum* of compensatory damages, if any, to which they were entitled. The learned judge who tried the case inadvertently failed clearly to define the rule for the admeasurement of damages as to the crops or the land. For breach of contracts or injuries to property the true measure of damages should be set forth with such degree of clearness and certainty that the jury will not be confused or misled. 17 C. J., 1061; 8 R. C. L., 661; *Coles v. Lumber Co.,* 150 N. C., 190; *Cherry v. Upton,* 180 N. C., 1. Neither the instruction concerning "serious damage to the crops" nor the instruction concerning the "material and serious damage or material depreciation of the value of the land" embodies a clear statement of the rule, and it is impossible to know whether the damages were or were not properly awarded. The jury should clearly understand whether the damages to be assessed on the fourth issue are permanent or temporary in character, and in either event the proper rule should be applied. Moreover, the fourth issue should be framed so as to show definitely, as the evidence and pleadings may warrant, whether the damages are permanent or recurring. *Ridley v. R. R.,* 118 N. C., 996; *Parker v. R. R.,* 119 N. C., 686; *Brown v. Chemical Co.,* 165 N. C., 421.

It is also doubtful whether the jury comprehended the instruction that his Honor intended as to the burden of proof, especially on the fourth issue.

Since a new trial is granted for the reasons assigned, it is unnecessary to discuss the several exceptions relating to the admission and rejection of evidence.

New trial.

G. D. PERRY ET AL. v. COMMISSIONERS OF BLADEN.

(Filed 26 April, 1922.)

1. **School Districts — Taxation — Consolidation—Statutes—Nonlocal Tax Districts—Elections—Constitutional Law.**

The combination or consolidation of local school tax districts with territory that has not voted a special tax for the purposes of schools must fall within the provisions of C. S., 5530, whereby the proposed new territory is required to vote separately upon the question of taxation, in conformity with our Constitution, Art. VII, sec. 7.

2. Statutes—Interpretation—In Pari Materia—School Districts.

The various statutes relating to the establishment of local school tax districts with regard to approval of the voters will be so construed by the courts as to harmonize their provisions, when possible, and give to each and every one its proper significance, if such can fairly and reasonably be done.

3. School Districts—Consolidation—Statutes—Taxation—Outlying Territory—Election—Constitutional Law.

The application of the provisions of C. S., 5526. to the formation of new local school tax districts without regard to township lines, etc., refers primarily to instances where new districts are created or formed, as therein prescribed, out of territory exclusive of special tax districts, or out of territory having the same status throughout its entirety, in relation to the then existing school tax or taxes, so as to give every voter a fair chance, uninfluenced by other considerations, to declare with his ballot whether or not he wishes to be taxed for the creation and maintenance of the district proposed.

4. Same—High Schools.

In this case is presented the question of a combination of several local school tax districts with a further territory within which no special school tax has been voted, C. S., 5530, and the question of the establishment of a central high school for a given township, under C. S., 5511, is not presented.

5. Same—Amendatory Statutes.

The authority given the county board of education to redistrict the entire county or part thereof, and to consolidate school districts, etc., C. S., 5473, is amended by Public Laws of 1921, ch. 179, providing, among other things, for such consolidation of existing districts under a uniform rate of taxation not exceeding the lowest in any one district, meets the requirements of our Constitution, Art. VII, sec. 7, but to the extent the amendatory statute permits consolidation of local school tax districts with adjacent territory or local schools that have never voted any tax, the provisions of C. S., 5530, must apply so as to permit those living in such proposed new territory to vote separately upon the question of taxing themselves for the purpose.

6. Same.

The provisions of Public Laws of 1921, sec. 1, ch. 179, authorizing local school tax districts "to vote special tax rates for schools on the entire district according to law" apply to future levies after the consolidation of the original districts, or after the unification of the different tax rates have been affected in accordance with our organic and valid statutory law in pursuance therewith.

7. Same—Equal Taxation—Debt.

Where the county board of education, acting under the provisions of C. S., 5473, amended by Public Laws of 1921, ch. 179, attempt to consolidate a local school tax district with nonlocal tax districts, *semble*, C. S., 5531, 5532, would apply, whereunder no such special tax district may be established "when it is in debt in any sum whatsoever": *Held*, there should be an election held separately for the voters of the new territory to pass upon the question of taxing themselves, for the purposes of the proposed district under the provisions of C. S., 5530. *Riddle v. Cumberland*, 180 N. C., 321, cited and distinguished.

APPEAL by plaintiffs from *Kerr, J.*, at the October Term, 1921, of BLADEN.

Civil action to enjoin and perpetually restrain the defendants from levying and collecting a special school tax, authorized by a vote of the people in a new and proposed consolidated district of what was originally three contiguous and adjacent school districts in Bladen County, namely, Council, a local tax district, and Carver's Creek and Boggy Branch, nonlocal tax districts. A majority of the voters in the two districts last named voted against levying the special tax here called in question, but the tax was carried in the entire territory voting as a unit.

From a judgment denying the relief sought and adjudging the tax to be valid and legal, the plaintiffs appealed.

R. D. Dickson for plaintiffs.
Henry L. Williamson and J. Bayard Clark for defendants.

STACY, J. The facts of this case, briefly stated, are as follows: Council, Carver's Creek, and Boggy Branch have been for many years and were up to 6 June, 1921, when consolidated by the board of education of Bladen County, three contiguous and adjacent school districts, occupying and covering a large portion of Carver's Creek Township, which township covers the entire southeastern end of Bladen County from the Cape Fear River to the Columbus County line.

In the year 1905 a special tax election for schools was held in the old Council District, and a tax of 30 cents on the $100 valuation of property and 90 cents on the poll was voted and carried. This tax, by another election held in said district in 1920, was increased to 50 cents on the $100 valuation of property and $1.50 on the poll. Also, there was held in the year 1917 in said old Council District a school bond election and a tax of 15 cents on the $100 valuation of property and 45 cents on the poll to pay interest, and to create a sinking fund on account of said bonds, was voted and carried, which tax has been levied and collected annually in said district since that time; the bonds issued by authority of said election being due to mature in 1922, one year after the date of election herein contested.

While this was the status of the old Council School District with reference to taxes, the Carver's Creek and Boggy Branch districts had never voted a special school tax of any kind prior to the date of the election herein contested.

One 6 June, 1921, the board of education of Bladen County combined these three districts into one consolidated district; and on the same day it caused to be ordered an election in said consolidated district on the question of voting a special tax of 30 cents on the $100 valuation of property and 90 cents on the poll, "to supplement the public school fund to be apportioned by the county board of education to said consolidated district," which election was held on 18 July, 1921, and carried by a majority of the voters in the entire territory, and this is the election which the plaintiffs contest.

While the vote in the instant election was taken without regard to the former lines of the old school districts, yet, as a matter of fact, a majority of those residing in the territory of the original nonlocal tax districts of Carver's Creek and Boggy Branch voted against the levy now sought to be enjoined.

It is conceded that prior to the enactment of Public Laws 1921, ch. 179, the present consolidated district could not have been formed except as provided by C. S., art. 18, ch. 95; and in *Paschal v. Johnson, ante,* 129, decided intimation is given that where local tax districts are sought to be combined and joined with nonlocal tax districts, or nonspecial tax territory, the question should be considered and dealt with as an enlargement of districts already existing under C. S., 5530, whereby the outside territory is allowed to vote separately on the proposed tax. And such is the holding in *Hicks v. Comrs.*, just decided.

In construing these different statutes, relating to the same subject-matter, as they do, it is our duty to reconcile and to harmonize them, if possible, and at the same time to give to each and every one its proper significance, if such can fairly and reasonably be done. *Cecil v. High Point,* 165 N. C., 431.

For the sake of clearness, it may be well to note just here that the procedure authorized by C. S., 5526, would seem to refer, and apparently was intended to apply, primarily to cases where new districts are created, or formed, in the manner prescribed therein, out of territory exclusive of special tax districts, or at least out of territory having the same status throughout its entirety, so far as concerns the then existing school tax or taxes. Under these circumstances every voter is given a fair chance, uninfluenced by other considerations, to declare with his ballot whether or not he wishes to be taxed for the creation and maintenance of such a district. To allow this section to be called into operation under any other conditions would be to introduce different considerations for popular approval in different sections of the district, and this no doubt would have a tendency to retard rather than to promote the cause of education and the establishment of better schools. At any rate, such would seem to be the legislative intent as gathered from a careful reading of the section. *Hicks v. Commissioners, post,* 394; *Howell v. Howell,* 151 N. C., 575; *Gill v. Comrs.,* 160 N. C., 177; *Chitty v. Parker,* 172 N. C., 126. In the case at bar different issues were being voted upon by different portions of the consolidated district. In the old Council District the sole question was not whether the voters in that district should continue a special tax for schools, but, for them, the success of the election meant a reduction of 20 cents on the $100 valuation of property and 60 cents on the poll; and for the voters of the old Carver's Creek and Boggy Branch districts it meant the imposition of an entirely new and special tax. The people in the nonlocal tax districts of Carver's Creek and Boggy Branch were outvoted by the practically unanimous vote cast in the old Council District. We do not think the Legislature intended that the school law should be executed in this way.

Possibly it would be well to observe, also, that we are not now considering the proposed establishment of a central high school, or high schools, in a given township, as provided by C. S., 5511. *Woosley v. Comrs.,* 182 N. C., 429.

We then come to a consideration of C. S., 5473, as amended by Public Laws 1921, ch. 179. It will be conceded, at the outset, that the amendment of 1921 is somewhat ambiguous and its application is not altogether free from difficulty. But regardless as to how we may be able to adjust its provisions to preëxisting statutes, in all events, they must be made to square with the requirements of the Constitution, or else disregarded. Prior to the enactment of this amendment the only procedure whereby a special tax district could be enlarged was under C. S., 5530. This gave the voters residing in the nonlocal tax territory a separate vote on the question. The statute just mentioned provides: "In case a majority of the qualified voters in such new territory shall vote at the election in favor of a special tax of the same rate as that voted and levied in the special tax district to which the territory is contiguous, then the new territory shall be added to and become a part of the special tax district. . . . In case a majority of the qualified voters at the election shall vote against the tax, the district shall not be enlarged."

But Public Laws 1921, ch. 179, sec. 1, provides that county boards of education may consolidate local tax districts, including special chartered districts, with other local tax districts having the same or different special tax rates, and also with nonlocal tax districts, but the rate on any consolidated district created from local tax districts having different local tax rates shall be made uniform by the county commissioners upon the recommendation of the county board of education. Again, "no taxpayer in such consolidated district shall be required to pay a higher special tax rate than that voted originally in his district." It is further provided that such consolidated districts, as are authorized by said act, shall be permitted "to vote special tax rates for schools on the entire district in accordance with law."

This last clause, we apprehend, has reference to future levies after the consolidation of the original districts and the unification of the different tax rates have been effected, and not perforce to an election for the purpose of accomplishing consolidation and fixing the rate of tax. The preceding clause of the act above mentioned undertakes to provide for securing uniform rates for consolidated districts, created from local tax districts having different local tax rates, and, as now advised, we see no inherent objection to this procedure. *Paschal v. Johnson, supra.* A special tax of some rate, in each case, has already been voted by the people of every portion of the district and the uniform rate, to be fixed by the commissioners, is not to exceed the minimum tax originally voted in any part of the district. The larger tax, previously voted in some other portion of the district, may properly be said to include the smaller tax; and this, we perceive, would suffice to meet the requirements of Article VII, section 7, of the Constitution.

But the statute is silent with reference to fixing the uniform rate or rates where local tax districts, or special chartered districts, are combined with nonlocal tax districts. Just here we have experienced some difficulty in applying the provisions of this enactment of the Legislature. It follows as a matter of course that if the county commissioners cannot establish for any consolidated district a rate of tax higher than that originally voted in any part of said district, and some part has voted no tax at all, then, under the clause requiring that the different rates shall be made uniform, it appears that the commissioners, in such cases, would be required to reduce the tax to nothing; or, to state it differently, in such cases they *ipso facto* would seem to be without any proper authority at all to levy these special uniform taxes throughout the entire district. Indeed, this apparently follows as a necessary corollary, because, under the Constitution and in the manner here provided, such taxes may not be imposed without a favorable majority vote of all the people affected. *Stephens v. Charlotte,* 172 N. C., 564; *Hollowell v. Borden,* 148 N. C., 255; *Smith v. Trustees,* 141 N. C., 143; *Rodman v. Washington,* 122 N. C., 39; *Goldsboro v. Broadhurst,* 109 N. C., 228. For this reason, in cases where local tax districts or special chartered districts are sought to be combined with nonlocal tax districts, we are compelled to invoke the aid of C. S., 5530, and to deal with the question under the principle of enlarging a preëxisting district or districts. *Paschal v. Johnson, supra; Hicks v. Board of Education, supra.*

But if it be contended that the unification of the different tax rates applies only to those cases where local tax districts, including special chartered districts, are consolidated with other local tax districts having different tax rates, then, in those cases where the consolidation involves the combining of a local tax district or special chartered district with a nonlocal tax district, it would seem that the provisions of C. S., 5531 and 5532, require observance (*Key v. Board of Education,* 170 N. C., 123), or else there should be an election as contemplated by C. S., 5530.

But defendants contend that under the decisions of *Riddle v. Cumberland,* 180 N. C., 321, the instant election should be approved and the validity of the tax in question upheld. The facts of that case were as follows: In 1920 a movement was instituted for the formation of the whole of Gray's Creek Township, Cumberland County, into one township high school district, and also into a special tax district for elementary schools with a tax rate of not more than 30 cents on the $100 valuation of property and 90 cents on the poll. Within said township, and constituting the same, were five school districts; two with special taxes, three without. The petition for said election stated that if said election carried the old special tax districts with their taxes were to be abolished, the new rate to take their place; but if said election failed the old special tax districts were to remain in existence. The election was called on this basis and carried. Several propositions, it will be seen, were embodied in this election; but it appears that they were all clearly understood and fully comprehended by the voters throughout the entire township. However, none of the objects sought to be obtained were opposite and antagonistic by which an appeal to conflicting interests could be made, as in *Hill v. Lenoir Co.,* 176 N. C., 572, and for this reason the election was sustained. Furthermore, with the abolition of the special tax districts, which was one of the propositions submitted to the voters of the respective districts in said election, the entire township was then left in the same condition or status so far as school taxes were concerned; and this, it may be said, paved the way for proceeding under C. S., 5526. While this may have been somewhat irregular, yet, it appearing that such procedure in the particular case was free from any material harm and, having due and proper regard for substance and the accomplishment of results, the election was upheld.

The distinguishing features between the *Riddle case, supra,* and the case at bar may be stated as follows: (1) The case at bar involves a *reduction* in the tax rate of the old special tax district; not so in *Riddle's case.* (2) There a township high school (C. S., 5511) was to be established; not so here. (3) In the present case the old special tax district has voted bonds and is now in debt on account of same. In *Riddle's case* there was no bar to abolishing the already existing special tax districts, and this was specifically provided for in the call for the election. C. S., 5532, provides that no special tax district shall be abolished when such district is in debt "in any sum whatever." Hence, the conclusion reached in the *Riddle case* is not permissible here. The old Council District, being in debt for bonds previously issued, may not be abolished until they are paid. Indeed, the holders of such obligations, being creditors, as they are, may insist upon the levying and collecting of the amount of taxes authorized at the time of the sale of said bonds. *Smith v. Comrs.,* 182 N. C., 149.

Finally, the pertinent and controlling facts in the instant case are substantially the same as those in *Hicks v. Commissioners,* next case *post,* and for the additional reasons assigned in that opinion—the two cases being governed by the same principles—it follows that his Honor below was in error in declining to grant the relief sought. This will be certified to the Superior Court, to the end that judgment may be entered for the plaintiffs on the facts agreed or found.

Reversed.

F. T. HICKS, W. E. MUSGROVE ET AL. v. BOARD OF EDUCATION AND BOARD OF COUNTY COMMISSIONERS OF WAYNE COUNTY, AND OTHER TAXPAYERS.

(Filed 26 April, 1922.)

1. **School Districts—Creation of Districts—Combination of Districts.**

C. S., 5526, providing for the creation of a special school tax district by the county board of education without regard to township lines, upon an election to be held within the proposed district, after notice, etc., refers to territory having no special school tax and has no application to the enlargement of such district under the provisions of C. S., 5530, wherein one or more school tax districts have already been established and there is other contiguous territory sought to be included which has not voted any special school tax.

2. **Same—Outlying Territory—Vote of the Electors—Elections.**

Where one or more special school tax districts have been established under the provisions of our statutes applicable, such districts may not extend their territory to include other districts and adjacent territory that have not voted a special tax, without the question having first been submitted to and approved separately by the voters of the outlying territory, and giving them the right to independently determine for themselves whether they shall be specially taxed, in the amount proposed. C. S., 5530. The distinction between *Riddle v. Cumberland*, 180 N. C., 321, and *Perry v. Comrs., ante,* 387, and this case, shown and commented upon by *Walker, J.*

3. **Same—Enlargement of Existing District.**

In proceedings to establish a special school tax district under the provisions of C. S., 5526, it appeared that therein was included several local tax districts already established, and also territory wherein no special tax had been voted, and the proceedings were properly instituted by only one of these local school tax districts: *Held*, the proceedings were for the enlargement of the petitioning local tax district, and required that the others therein should also have proceeded regularly under the statute and that the electors in the proposed part that had not voted a special tax be permitted to vote separately upon the question of the contemplated increase for the designated purpose. C. S., 5560.

4. Statutes, in Pari Materia—School Districts—Special Tax—Elections.

C. S., 5526, providing for the creation of new local school tax districts, and section 5530 requiring the question of an enlargement of an existing special school tax district to be submitted separately to the voters of the proposed new territory are to be construed *in pari materia*, and the provisions of each are held reconcilable with those of the other.

5. Same—Taxation—Elections.

Laws of 1921, ch. 179, providing for the consolidation and adjustment of rates of taxation and authorizing the voters of a district so consolidated to vote special tax rates for the schools in the entire district, etc., should be construed to harmonize with C. S., 5530, and the provisions of the former statute do not affect or impair the requirement of the latter one, that for an extension of the boundaries of an existing local school tax district or districts, the approval of the tax proposed must first be given by the voters in the proposed new and contiguous territory.

6. Same—Abolition of Districts.

Under the provisions of C. S., 5530, a local tax school district may be abolished by the act of creating a new one of which it is a component part, while section 5531 is restricted simply and singly to the abolition of an existing district, and so construed: *Held*, these sections are in harmony with each other.

APPEAL by plaintiff from *Cranmer, J.*, at October Term, 1921, of WAYNE.

Controversy submitted without action under C. S., 626, upon the following facts agreed:

1. Pursuant to section 4115 of the Revisal, a petition signed by more than one-fourth of the freeholders within a proposed special school district in Wayne County, in whose name real estate in such district is listed on the tax lists for the current fiscal year, was duly presented to and endorsed by the county board of education of Wayne County, and the board of county commissioners, after thirty days notice at the courthouse door and three other public places in the proposed district, held an election in accordance with section 4115 of the school law, to ascertain the will of the people within the proposed special school district, whether there shall be levied in said district a special annual tax of not more than thirty cents on the hundred dollars valuation of property, to supplement the public school fund which may be apportioned to the said district by the county board of education, in case such tax is voted.

The above mentioned petition reads as follows, and contains signatures of taxpayers from all parts of the district:

PETITION FOR A SPECIAL TAX ELECTION

To the Board of Commissioners of Wayne County:

We the undersigned freeholders in the county of Wayne, constituting one-fourth of the freeholders in the proposed special school district included within the following boundaries, to wit: All of Pikeville Township, that part of Stoney Creek Township included in the Mt. Carmel District, and that part of Buck Swamp Township included in the Pleasant Grove District.

In order to establish at Pikeville a standard high school and to maintain in other sections of the said territory, efficient elementary schools, respectfully petition your honorable board for an election to ascertain the will of the people within the proposed special school district, whether there shall be levied in said district a special annual tax of not more than 30 cents on the $100 valuation of property, to supplement the public school fund which may be apportioned to said district by the county board of education in case such special tax is voted.

2. Several years ago the town of Pikeville, including the surrounding territory, voted for a special tax district which was established and still exists. In December, 1919, Mt. Carmel voted for a special tax school district, which was established and still exists. The said proposed special school district includes the present Pikeville School District, the Mt. Carmel School District, and also includes the contiguous territory of Pleasant Grove School in Buck Swamp Township, Taylor's School, and the whole of Pikeville Township. The new territory included within the proposed special school district has never heretofore voted for a special school tax district, and there is at present no such school district therein.

3. That all procedure required by C. S., 5526 (which is a part of Rev., 4115), leading up to the election was duly complied with, and the election thereunder was duly and regularly held on Saturday, 8 October, 1921, at which time there was a majority of the votes cast in favor of the proposed special school district. At said election all the qualified voters within the present Pikeville School District, the Mt. Carmel School District, and the new territory were allowed to vote.

4. That a majority of the committee or trustees of the Pikeville Special School District or of the Mt. Carmel School District did not request in writing that the county board of education may enlarge the boundaries of those special school districts which had been established.

5. A few days prior to the election a number of the taxpayers in the new territory in the proposed special school district conferred with counsel with reference to obtaining a restraining order against the holding of said election, and in a conference between the plaintiffs and counsel for defendants it was agreed that the restraining order should not be applied for, and that at the October term of the Superior Court of Wayne County a controversy without action should be submitted to the court to determine the question as to whether or not the said election is legal or illegal, and it is further agreed that if the court shall hold the election illegal, then said election shall have nothing to do with any further steps that may be taken towards the creation of another district, but shall be canceled the same as if it had not been held. It is further agreed that nothing herein shall affect the right of either party to appeal and have the matters in controversy fully litigated and determined by the Supreme Court.

6. The plaintiffs contend that the purpose of the petitioners for the establishment of the proposed special school district is simply to enlarge the boundaries of the present Pikeville Special Tax District, and that said election should have been held as provided for by section 5530 of the Consolidated Statutes of 1919 (which is part of section 4115 of the Revisal of 1908, and referred to by the board of county commissioners as section 4115 of the school law), and that at said election the residents now within the Pikeville Special Tax District should not have been permitted to vote, and that only the qualified voters in the said new territory should have been allowed to vote at the election, and that since all the qualified voters in the proposed special school district were permitted to vote at the election which was held, that, therefore, said election was illegal.

7. The defendants contend that this special school district (which district happens to include other smaller districts), can be created pursuant to section 5526 of the Consolidated Statutes (which is part of section 4115 of the Revisal of 1908), and that the election held under said statute was legal.

It is agreed that the foregoing shall constitute the agreed statement of facts in a controversy without action.

This 22 October, 1921.

Signed by counsel for the respective parties, and duly verified.

NORTH CAROLINA—WAYNE COUNTY.

Whereas certain citizens of the proposed special school district, which is to include Pikeville Township, Mt. Carmel, and certain other contiguous territories, are contemplating procuring an injunction against the holding of the election which is called for Saturday of this week;

and whereas all the parties interested in the holding of said election, both pro and con, are desirous of having the matter determined strictly upon its legal merits:

Now, therefore, it is agreed by counsel representing both sides of the controversy, with the approval of citizens representing both sides, as follows:

1. The election shall be held as called on Saturday of this week, and no restraining order shall be served against the holding of said election.

2. At the October term of the Superior Court, which convenes 10 October, it shall be submitted to the court as a controversy without action, the question whether or not the said election is legal or illegal, and if finally held illegal by the court, it is agreed by the advocates of the special school district that the tax shall not be levied, and that the election shall be canceled, and if any further steps are taken towards the creation of a district, the election held on Saturday of this week shall have nothing to do with the creation of the district.

3. It is further agreed that nothing herein shall affect the right of either party to appeal and have the matters in controversy fully litigated and determined by the Supreme Court.

This 4 October, 1921. (Signed by counsel.)

Upon the said case agreed, the court held, and so adjudged, that the two boards had ample authority to proceed under the law as they did in the creation of the new special tax school district, as prayed for in the petition, and that the election held for that purpose was in all respects legal and binding, and that said election being valid, the returns of the same shall be certified and acted upon as required by the statute. Costs against the plaintiffs. (Signed by the presiding judge.)

The plaintiffs duly excepted and appealed.

Wentworth W. Pierce and J. H. Pou for plaintiffs.
Langston, Allen & Taylor and Teague & Dees for defendants.

WALKER, J. This is a controversy submitted without action to test the validity of an election proposing to create a standard high school at Pikeville, N. C., and to maintain efficient elementary schools at other sections in the same district, and to levy a special tax not more than 30 cents on the $100, to supplement the public school fund.

Plaintiffs contend that the election was not held in accordance with law, but clearly in contravention of two complete statutes relating to special school tax districts, and that the effect of this election, if it were valid, will be to abolish three existing special school districts within the territory of the proposed district, and this abolition will be worked not directly but incidentally, or will not be accomplished in the manner prescribed by the statute for the abolition of special school tax districts. That C. S., 5531, provides the only method available for the abolition of a special tax district theretofore created and existing by virtue of an election held therein. Briefly, it provides that an election may be held upon petition of two-thirds of the qualified voters, and if at the election a majority of the qualified voters in said district shall vote against special tax, the tax shall be deemed revoked and shall not be levied, and the district shall thereby be discontinued.

Section 5532 provides for the continuance of any debt created, notwithstanding the district be abolished.

Section 5533 provides that an election for abolition shall be held not oftener than once in two years.

Section 5535 provides that an election may be held for the purpose of increasing the tax in a special tax district; but at its conclusion says: "No election shall be held oftener than once in two years."

The case on appeal sets forth that both the Mt. Carmel and Pleasant Grove special tax districts, included in the proposed consolidated or enlarged district, held elections less than two years prior to the election held last October for the purpose of establishing the consolidated district, and at such elections special taxes were levied, and plaintiffs contend that the effect of the new election, if held valid, will be to authorize an increase in taxes within less than two years after a former increase in tax had been voted. But we need not notice this contention any further in the view we take of the controversy. It is further contended by the plaintiffs that the Mt. Carmel and Pleasant Grove special tax districts cannot be either indirectly or inferentially abolished in any other manner than is prescribed by section 5531; and, as the election held undertakes in effect to abolish them, it was, therefore, in contravention of law, and is void.

The other ground of illegality urged against said election is that the order of the commissioners of the board of education of Wayne County undertaking to create a consolidated, or enlarged, district with Pikeville as its center, with the Pikeville School as the only high school in the district, and with elementary schools at other portions of the district, is an attempt to avoid a clear mandate of the law. It not only attempts to abolish the two school districts, Mt. Carmel and Pleasant Grove, in a manner not provided for by law; but it undertakes to add them to the Pikeville District, making them subsidiary to the Pikeville High School, which is beyond the travel reach of most of the pupils; and it does this without allowing those outside of the original Pikeville District an opportunity to vote separately upon the proposition whether they shall be added to the Pikeville District or not, as expressly recognized and declared by C. S., 5530.

Section 5530, upon which plaintiffs mainly rely, provides that upon the written request of a majority of the committee, or trustees, of any special tax district, the board of commissioners may enlarge the boundaries of such special tax district, subject to the approval of the voters to be expressed at an election which shall be held in the new territory. It prescribes that the voters in the new territory proposed to be included in the district shall have the privilege of voting whether they will levy upon themselves a special tax of the same rate (meaning the same rate that the special tax district levies). If a majority shall approve the tax rate, the proposed new territory is thereupon merged into the original district, and all in and out of the original district pay the same tax. This it is claimed is a fair and consistent act authorizing a reasonable exercise of the right of franchise or suffrage. The old district, it is argued, acts through its committee, and if it desires an enlargement, by resolution, it invites a certain designated territory to come into or join the district on the same terms enjoyed by those already in. The outsiders, at an election called for that purpose, pass upon the invitation, and either accept or decline it. If they accept, they have by a majority assumed a tax and acquired a corresponding benefit, or are supposed to have done so. It thus requires the affirmative act of the old district through its trustees, and the affirmative act of a majority of the taxpayers in the new district. If both approve, no one can complain. But in the case at bar, as plaintiffs assert, the old district did it all. It issued the invitation to come in, not depending upon the right of the taxpayers or voters in the new territory to accept or decline it, as they might see fit in their own interest to do, but that the old district or districts compelled the new and contiguous territory to be annexed to theirs, as they could and did easily do, because they had the majority and could outvote the minority in the new territory. This would seem to be contrary to the letter and the spirit of section 5530.

There is another ground upon which it is contended that this election is clearly illegal. There was, in the territory proposed to be embraced in the consolidated or new district, a considerable number of people who had never voted upon themselves any special tax whatsoever. They did not live in Pikeville District, nor in Mt. Carmel, nor in Pleasant Grove District. They lived in the country, where only the ordinary regular State school tax levy prevailed. These people have never voted any special tax upon themselves; and if this election is held valid, they will find themselves inside of a consolidated school district, with the 30 cents special tax imposed upon them, when they have never been allowed to separately vote on the question whether that tax should be levied or not, whereas they clearly were entitled to vote under section 5530, which vote, according to the plain directions of that section, must be among themselves as a unit. As it was, they only had the privilege of voting in common with the electors in three other special tax districts; and the question whether they should pay a special tax was not decided by them alone, as required by the statute, but by a majority of the voters living in three existing special tax districts, as well as a number on the outside. The votes were not taken separately, but taken as a whole, and the aggregate result declared. The people in the new territory practically had no voice in the matter.

It is strongly urged by the plaintiffs that the election has not been held according to the provisions of any law of this State, but on the contrary, that it has been held in a manner which is clearly in opposition to both the letter and the spirit of the statute, the effect of it being to tax the people of an entire township, and of parts of two other townships, to maintain a high school at Pikeville, with elementary schools elsewhere; but all the people to be taxed alike for the cost of the high school, whether they live near enough to enjoy it or not, and this without letting the people in the outlying or new territory, who are doomed to use only elementary schools, have the privilege of voting separately upon that proposition. If the principle contended for by defendants be upheld by the court, it is argued with much force that there will be no limit to which the enlargement of school districts may not go, provided always the school committee inviting the enlargement is sure that the votes of the insiders will outnumber the votes of the outsiders.

Another ground of illegality is alleged by the plaintiffs to be that Mt. Carmel and Pleasant Grove are school districts, each with a board of trustees; and the board of trustees of neither of these districts petitioned for an enlargement. They did not issue any invitation to those who lived in Pikeville District, nor to those who lived in any school district, nor to each other. So that it cannot be considered that the enlargement was of either of those special tax districts; and the only other special tax district upon which an enlargement could be effected is the Pikeville District; and we have it that Pikeville has asked that its school district be enlarged by the addition of outlying territory, but that the election did not permit the outsiders to vote separately upon that proposition. But however this may be, we need not inquire, as the other ground is, in our opinion, fully sufficient to invalidate the election and prevent the formation of a new district in the manner proposed.

The defendants' contention, as stated in the brief of their counsel, is that the formation of the new school district is authorized by C. S., 5526, which provides for the creation of special school tax districts by the county board of education in any county without regard to township lines under the conditions as set forth in that section, which further provides for an election to be held within the proposed district, after the required notice, to ascertain the will of the people within the proposed special school district, whether there shall be levied in such district a special annual tax of not more than 30 cents on the $100 valuation of property and 90 cents on the poll to supplement the public school fund which may be apportioned to such district by the county board of education in case such special tax is voted.

The defendants further contend that this special school district (which happens to include other small districts) can be created pursuant to section 5526 of the Consolidated Statutes (which is part of section 4115 of the Revisal of 1905), and that said election held under said statutes was legal, and that, this being so, the only question before the court is whether the board of education has the authority, under C. S., 5526, to create a special school tax district, which includes within its boundaries two smaller special tax districts, which had previously been created, together with new or additional territory; and if so, whether they should have proceeded under C. S., 5530, or under section 5526.

Under section 5530, they argue that the proceeding is commenced upon a written request of a majority of the committee or trustees of any special tax district, and it applies only to the enlargement of a district, and has nothing to do with the creation of a district, and, therefore, the procedure prescribed therein cannot be applicable to the case before the Court for the reason that there is no question of enlarging any one particular district.

We regard this contention as ignoring the distinction between creating a new district and enlarging one or more already established. A new district may be created by consolidating and enlarging one or more existing districts, which might be done by adding new territory to existing districts and giving them a new name, or an old district may be continued with added or increased territory. The two methods would be, in effect and for all practical purposes, an enlargement of the district, although called by a different name. Section 5526 would seem to refer to special school tax districts originally created or formed when the proceeding starts by petition of the designated number of freeholders. In that case every taxpaying freeholder has a fair chance to cast a vote, and declare thereby whether he elects to be taxed for the creation and maintenance of the new district, while under section 5530 the freeholders in the added territory would, in effect, have no such opportunity, as the combined negative vote of all of them in the new or added territory could be easily overcome by the decidedly preponderating affirmative vote in the old part of the district.

Our conclusion is, from a consideration of the entire law relating to the subject, that C. S., 5530, controls in a case like this one, so that where it is proposed to enlarge a district or districts by an addition of new and contiguous territory, an election must be held in the new territory to determine whether there shall be a special tax of the same rate as that voted and levied in the special tax district to which the territory is contiguous, and if a majority of the voters in the new territory shall vote in favor of the special tax, then the new territory shall be added and become a part of the special tax district, otherwise the district shall not be enlarged as proposed. There is a further provision in regard to any existing bonded indebtedness of the old district, which does not materially affect the question before us.

The provision for a separate election in the added or contiguous territory is not only a fair and just one, but is required to protect those living in the new territory from the levy of a tax imposed upon them virtually without their consent, or when, because of the difference in population and voting strength, they had no fair opportunity to be heard upon the question, whether they should become a part of the proposed district or not, and thereby be taxed for its support and maintenance. The case clearly comes within the spirit of section 5530, if it does not fall within its letter. The sections of the law we are considering, being *in pari materia,* should be construed together and with reference to the objects to be attained and the methods to be pursued in accomplishing them. But this Court has given strong intimation to an opinion favoring the right of voters to be heard in the new or added territory when it is said, in *Paschal v. Johnson, ante,* 129, as follows: "As to instances where the tax rates may differ, as where there is an attempt to combine a special tax district with nonspecial tax rate territory—the statutes present greater difficulty for these special school tax districts, organized and exercising governmental functions in the administration of the school laws, have been held to be *quasi*-public corporations subject to the constitutional provisions in restraint of contracting debts for other than necessary expenses except by vote of the people of a given district. *Smith v. School Trustees,* 141 N. C., 143; Constitution, Art. VII, sec. 7. Where such conditions are presented and owing to the constitutional objection suggested, it would seem that in order to combine a special tax district with nonspecial tax territory the question should be considered and dealt with as an enlargement of districts and coming under section 5530 of Consolidated Statutes, whereby the outside territory is allowed to vote separately on the proposed tax. The question, however, does not arise on the present record, and is only referred to in order to exclude the inference that in making our present decision we are approving *in toto* the provisions of Laws 1921, ch. 179, above referred to."

It seems to us that as the new territory is proposed to be added to two or more existing school tax districts, instead of one only, does not suffice to take the case out of the operation of C. S., 5530. They are all to form one district, and the fact that there are two or more instead of one moving in the matter furnishes greater reason why the people in the new territory should have a separate vote, so that they will not be out-voted, or their vote be overcome, by the two or more districts, perhaps each of them with a much larger voting population than that in the new territory. But, however that may be, our opinion is that the intention was that section 5530 should apply to the case as presented by this record.

Our attention was invited to Laws of 1921, ch. 179, which is supposed to be in conflict with our conclusion, but we do not think so, as the act of 1921 was evidently intended to be construed so as to harmonize with C. S., 5530; and there is really nothing in section 1 of the act of 1921 relating to the consolidation of school districts, or in its other sections, which prevents C. S., 5530, from having its full and intended operation, as the provision of section 5530 can well stand in its integrity, and have full and complete effect, without interfering at all with the similar operation of Laws of 1921, sec. 1. The consolidation therein provided for and the adjustment of rates of taxation may go on, and no taxpayer in a consolidated district required to pay a higher rate than that voted originally in his district, and the consolidated school districts authorized in the act of 1921 can vote special tax rates for schools in the entire district in accordance with law, and yet leave the people of "nonlocal tax territory contiguous to an existing school tax district" free to vote separately upon the question whether that territory shall be annexed to a special tax district or districts.

We are unable to discover why section 5530 and the act of 1921 may not well stand together without the latter abrogating or repealing any part of the former. Our duty is to reconcile them if it can be fairly and reasonably done. "Statutes upon the same subject-matter should be construed together so as to harmonize different portions apparently in conflict, and to give each and every part some significance, if this can be done by fair and reasonable interpretation." *Cecil v. High Point*, 165 N. C., 431; *Mfg. Co. v. Andrews*, 165 N. C., 285. "Separate sections of the Code should be so construed, if possible, as to reconcile them and effectuate each." *Propst v. R. R.*, 139 N. C., 397.

There is no necessary inconsistency between sections 5530 and 5531 of the Consolidated Statutes. The former may abolish a district by creating a new one of which it is a component part, while section 5531 may be restricted solely to the abolition of an existing district. Thus considered and construed, there is no reason why they should not coexist and be brought into harmony.

The case of *Riddle v. Cumberland County*, 180 N. C., 321, was cited to us as bearing some resemblance to this case, and *Perry v. Comrs.*, *ante,* 387, but it is shown in the last cited case by *Justice Stacy* that in several particulars set forth in that case there is a substantial difference between them sufficient to take them out of the rule of the decision in the *Riddle case, supra.* The latter case was brought under C. S., 5526, and the vote was taken accordingly. There was no fatal irregularity there in calling the election, while it appears in the facts agreed, upon which this case was tried, "that a majority of the committee or trustees of the Pikeville Special School District or the Mt. Carmel School District did not request in writing that the county board of education may enlarge the boundaries of those special school districts which had been established." Plaintiff contends that such a petition was necessary to authorize any election at all, under C. S., 5530, and it is so stated therein. It was intended, perhaps, to restrict section 5530 strictly to the case where a single district is enlarged by the addition of new and contiguous territory, and to refer section 5526 to a case where an entirely new district is to be formed, in which event all of those residing in the new district would have an equal and fair opportunity to vote, but we have concluded that a broader application should be given in this and the *Perry case, supra,* to section 5530, so as to make it embrace a case such as is presented in those records, noting the differences between them and the *Riddle case, supra,* as stated in *Perry's case, supra.*

As there was no sufficient compliance with C. S., 5530, in this instance, the election was invalid, instead of legal and valid, as held by the judge below, and the special tax district in question was not created according to law.

There was error in the judgment upon the case agreed which is reversed. Judgment will be entered instead for the plaintiffs.

Reversed.

WILLIAM ST. SING AND MACON ST. SING, FOR THEIR NEXT FRIEND, WILLIAM ST. SING, v. AMERICAN RAILWAY EXPRESS COMPANY.

(Filed 26 April, 1922.)

Carriers of Goods — Express Companies — Commerce — Federal Law — Written Notice—Damages—Condition Precedent.

Upon the express receipt of an interstate shipment of goods by the carrier was a stipulation requiring, among other things, that in order to make the carrier liable for the loss of the shipment, a claim must be made and presented in writing to the originating or delivering carrier within four months after the delivery of the property, or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed, etc.: *Held,* the Federal statute and the authoritative Federal decisions thereon afford the exclusive rule of the carrier's liability in such cases, and thereunder the filing of the written claim within the stated time is upheld as a reasonable stipulation requiring a compliance with its terms as a condition precedent to a recovery.

APPEAL by plaintiff from *Daniels, J.*, at September Term, 1921, of DURHAM.

Civil action, tried on appeal from the justice's court.

The action is to recover damages for the value of a package, to wit, a bicycle motor attachment, bought in St. Louis, Mo., and shipped with defendant to plaintiffs at Durham, N. C., under a uniform express receipt and contract of carriage, and which was never delivered to plaintiffs, the consignees. At the close of the plaintiff's evidence, on motion, there was judgment of nonsuit and plaintiff excepted and appealed.

J. W. Barbee for plaintiff.
W. B. Guthrie for defendant.

HOKE, J. There were facts in evidence tending to show that in February, 1920, William St. Sing, the father, ordered for his minor son and coplaintiff, Macon St. Sing, from H. R. Geer, St. Louis, Mo., a bicycle motor attachment, sending the price, $40, per postoffice order; that about the time the article should have been received (seven or eight days) plaintiff made inquiry for the package at the express office in Durham, and being informed that no such package was in hand, plaintiff commenced a correspondence with the vendor at St. Louis, and also took it up with the postoffice department, thinking the package might have been sent by parcel post, and finally, in September, 1920, plaintiff procured from Geer & Company the express receipt showing same had been shipped with defendant as common carrier, under a uniform express receipt, containing, among others, the following stipulation:

"7. Except where the loss, damage, or injury complained of is due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, as conditions precedent to recovery claims must be made in writing to the originating or delivering carrier within four months after delivery of the property, or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed, and suits for loss, damage, or delay shall be instituted only within two years and one day after delivery of the property, or in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed."

That as soon as plaintiff obtained receipt, it was exhibited to express agents who informed plaintiff it would be necessary in order to file an intelligent statement of his claim, that he should have the invoice. This was procured in about three or four weeks longer, and both left with the company's agents at Durham. The package was never received by plaintiffs, or either of them, and no formal or written claim for the loss was ever made or filed with the company or its agents other than leaving with them the express receipt and invoice, as stated, and which was in October, 1920.

There was further evidence permitting the inference that the shipment had in the usual course been sent to Richmond and disposed of, as for unclaimed goods, and could not now be recovered. The letter of defendant asserting nonliability on the contract of carriage being as follows:

DURHAM, N. C., 11 February, 1921.

MR. MACON ST. SING,
1016 Holloway Street,
Durham, N. C.

DEAR SIR:—Referring to your claim of $40, account of nondelivery of one motor.

The motor, which the claim agent located in the no-mark bureau at Richmond, Va., had been disposed of before we requested it forwarded to this office, and it cannot be recovered.

In view of the fact that the claim was not presented until 18 October, 1920, while shipment was made 24 February, 1920, the claim agent instructs that your claim be declined under article 7 of the uniform express receipt. Therefore, I am returning to you all papers submitted with your claim and closing my file. It is to be regretted that you did not make claim within the fourth months and one week time limit.

Yours very truly,
(Signed) C. T. BRANSON, *Agent.*

Upon these facts, chiefly relevant, we must approve the ruling by which the judgment of nonsuit has been entered. This being an interstate shipment, the Federal statutes applicable and the authoritative decisions thereon, afford the exclusive rule of liability in these cases, and by them it is clearly recognized that a rule requiring that the party aggrieved by breach of contract of carriage, and as condition precedent to recovery, shall file with the company a written claim of his damages within four months from the time of delivery or in case of loss within four months after a reasonable time for delivery has elapsed, is reasonable and valid. *Texas & Pacific Railway v. Leatherwood,* 250 U. S., 478; *Georgia, etc., Railway v. Blish Milling Company,* 241 U. S., 190; *Taft v. R. R.,* 174 N. C., 211; *Phillips v. R. R.,* 172 N. C., 86; 38, part 1, U. S. Statutes at Large, ch. 176, pp. 1196-1197, and also in U. S. Compiled Statutes, 1918, sec. 8604 a; the same being set out in *Mann v. Transportation Co.,* 176 N. C., 104-105.

From the facts in evidence it very clearly appears that no written statement has ever been filed with the company or its agents for this claim, and nothing that could in any way be considered as a filing, until more than six months had elapsed from the time of shipment and from the time when the same should have been delivered at Durham, the point of destination, and by the express terms of the contract of carriage entered into between the parties, the plaintiff's right of action is barred.

True, the Federal statute above referred to contains the provision: "That if the loss or damage or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice or claim nor filing claim shall be required as a condition precedent to recovery," but there is no allegation or suggestion that the injury here complained of comes within the purport or meaning of the proviso, but the claim is for absolute loss of goods in breach of the contract of carriage, and disposed of in the usual way after the time for filing the claim had elapsed, and presents a typical instance, calling for application of the contract stipulation protecting a company from liability.

It may be well to note also that there is no claim or suggestion that defendant company has realized any substantial value on sale of goods, or that it is liable for the proceeds on the equitable principle of *indebitatus assumpsit*, a question not now presented or determined, but the action, as stated, is brought for damages suffered by breach of defendant's contract of carriage and against which defendant is protected by plaintiff's failure to file their claim within the time stipulated.

There is no error, and the judgment of nonsuit is

Affirmed.

C. H. GRIFFITH ET AL. v. BOARD OF EDUCATION OF FORSYTH COUNTY ET AL.

(Filed 26 April, 1922.)

1. **Injunction—Equity—Elections.**

The courts of equity are slow to enjoin the holding of elections, and while they will not do so unless it is clear they are being illegally held, ordinarily the writ will issue to restrain the holding of an election where there is no authority for calling it and it will result in a waste of public funds.

2. **Same—Remedy Unnecessary—Subject-matter.**

The appeal from an order dissolving a temporary injunction will be dismissed in the Supreme Court when it appears that an election against which this remedy has been sought, has not been held, and cannot be under the previous action of defendant board of education in calling it, and it appears there is presently nothing upon which it could operate.

APPEAL by plaintiffs from *Lane, J.*, at July Term, 1921, of FORSYTH.

Civil action to enjoin and restrain the holding of an election in a new and proposed consolidated school district composed of what was originally two contiguous and adjacent districts in Forsyth County, namely, Bethania, a special tax district, and Old Town School District, a nonlocal tax district. The purpose of the election was to ascertain the will of the voters of the entire territory in regard to levying a special school tax for the said proposed district. The call for the election designated 12 July, 1921, as the date upon which it should be held. A temporary restraining order was issued in this cause, same being afterwards dissolved on 12 July, 1921, but it seems that the election was not held.

From the order dissolving the temporary injunction, the plaintiffs appealed.

Holton & Holton and Jones & Clement for plaintiffs.
Hastings & Whicker and E. F. Cullom for defendants.

STACY, J. It appears that the purpose for which this action was instituted, to wit, to prevent the holding of the election in question, has been accomplished. At any rate, the election was not held, and there is nothing now to enjoin. *McKinney v. Comrs.* (Fla.), 3 So. Rep., 887. The time for holding the election has long since passed, and it cannot presently be held, under the previous action of the defendants. Nothing further can be done in the way of levying the proposed tax unless another election is called. The appeal, therefore, must be dismissed. *Kilpatrick v. Harvey,* 170 N. C., 668; *Moore v. Monument Co.,* 166 N. C., 212; *Harrison v. Bryan,* 148 N. C., 315.

Courts of equity are slow to enjoin the holding of elections and ordinarily they will not do so unless it is clear that they are being illegally held. *Hood v. Sutton,* 175 N. C., 101. The wisdom for this cautious exercise of such power is obvious. *Connor v. Gray,* 9 Anno. Cases, 121, and note. But it is generally held that an injunction will issue to restrain the holding of an election where there is no authority for calling it, and where the holding of such an election would result in a waste of public funds. *Solomon v. Fleming,* 34 Neb., 40; 9 R. C. L., 1001.

The record is silent as to whether the defendants expect to pursue the instant matter further; but, we apprehend that such is their purpose, or else this appeal would not have been presented for our consideration. We have experienced some difficulty in trying to harmonize the provisions of Public Laws 1921, ch. 179, with all the sections of C. S., art. 18, ch. 95, and at the same time square them with the requirements of the

Constitution; but, from the facts now appearing, we cannot say, in advance, that the defendants are proposing to proceed in an unlawful manner. The contrary will be presumed. *Thrash v. Comrs.,* 150 N. C., 693. It may not be amiss, however, to call attention to some of the recent decisions bearing more or less directly upon the subject now in hand, though it is conceded that these cases are not decisive of the exact question which the parties to this proceeding have sought to raise. *Hicks v. Comrs., ante,* 394; *Paschal v. Johnson, ibid.,* 129; *Perry v. Comrs., ibid.,* 387.

Appeal dismissed.

JOHN C. WINDER v. L. H. MARTIN ET AL.

(Filed 26 April, 1922.)

1. **Landlord and Tenant — Leases — Acceptance of Rent—Forfeiture—Election of Remedies—Waiver.**

The application of the principle upon which the landlord, by accepting the rent after the lessee's forfeiture of his rights under the terms of his lease, is a waiver of his right to terminate the lease, is upon the theory that the landlord has been put to a voluntary election between two opposing courses, and not when the lessee remains in possession of the leased premises by giving the bond for possession, in a summary action of ejectment.

2. **Same.**

Where the breach of the tenant of his contract of lease amounts to a forfeiture, and his landlord voluntarily accepts the rent accruing thereafter, his thus voluntarily accepting the rent will prevent him at a later time from insisting upon the forfeiture under circumstances that would otherwise have avoided the lease.

APPEAL by plaintiff from *Long, J.,* at the January Term, 1922, of GUILFORD.

Summary proceeding in ejectment to evict the defendants as tenants from the premises of the plaintiff.

From a judgment in favor of the defendants the plaintiff appealed.

John A. Barringer and R. M. Robinson for plaintiff.
Thomas C. Hoyle and F. P. Hobgood, Jr., for defendants.

STACY, J. This was a summary proceeding in ejectment, commenced in a court of a justice of the peace, and tried *de novo* on appeal to the Superior Court of Guilford County. From the judgment of the latter court the case comes to us for review.

Defendants rented the premises in controversy to be used by them in selling petroleum products, through means of a filling station erected thereon, and for serving the public generally in regard to automobile supplies, etc. The relation of landlord and tenant and the due execution of the lease are admitted. It was stipulated as a condition of the rental contract that the defendants, while occupying said premises and conducting a filling station thereon, should purchase all gasoline used by them in their business from the Todd Oil Company, a copartnership in which the plaintiff was interested; and, upon failure to comply with this provision, the plaintiff reserved the right to "reënter the said premises and to expel the lessees therefrom without prejudice to other remedies." The jury found that this stipulation, or covenant, was breached by the defendants on 10 October, 1921; but his Honor entered judgment for the defendants *non obstante veredicto,* because the plaintiff, or his duly authorized agent, thereafter accepted and received the rent for said premises for the months of November and December, 1921, and January, 1922.

This action was instituted on 18 November, 1921, and tried on appeal in the Superior Court of Guilford County, 24 January, 1922. The rent for November, 1921, was accepted and received after the alleged breach on 10 October, and before the institution of this action on 18 November, The December rent and the January rent were received after suit had been filed and during its pendency. Did the plaintiff, by the acceptance of rent under these circumstances, waive the breach as found by the jury? This is the question for decision. It is the generally accepted rule that if the landlord receive rent from his tenant, after full notice or knowledge of a breach of a covenant or condition in his lease, for which a forfeiture might have been declared, such constitutes a waiver of the forfeiture which may not afterwards be asserted for that particular breach, or any other breach which occurred prior to the acceptance of the rent. Or to state the rule differently, it is generally held that the acceptance of rent by the landlord, with full knowledge of a breach in the conditions of the lease, will ordinarily be treated as an affirmation by him that the contract of lease is still in force, and he is thereby estopped from setting up a breach in any of the conditions of the lease and demanding a forfeiture thereof. *Moses v. Loomis,* 47 A. S. R., 194, and note; 16 R. C. L., 1132 *et seq.*

But plaintiff contends that the above rule is not applicable to the facts of the instant case, because the rents for the months of December and January were accepted after the institution of the present suit. For this position he relies upon the case of *Palmer v. City Livery Co.,* 98 Wis., 33; 73 N. W., 559, where it was said:

"The question is whether the receipt of the rent by the plaintiffs was, in the circumstances, a waiver of their right to insist on the forfeiture of the lease. It is the settled law, no doubt, that the landlord who, with knowledge of the breach of the condition of a lease for which he has a right of reëntry, receives rent which accrues subsequently, waives the breach, and cannot afterwards insist on the forfeiture. *Gomber v. Hackett,* 6 Wis., 323; *Conger v. Duryee,* 90 N. Y., 594. This is on the ground that the landlord has an election. He may choose whether he will declare the lease at an end and reënter at once, or whether he will overlook the breach and let the lease remain in force. Of course, he cannot do both, for the two courses lead in opposite directions; and, because the taking of rent which accrues subsequently to the breach is incompatible with a rescission of the lease, it is held that the acceptance of rent under such circumstances is clear evidence of an election to have the lease continue in force. The rule, being founded on the exercise of his option by the landlord, can have no place in a situation where no option is afforded him.

"The only question here is whether the rule of election applies in the facts of this case. Practically the question is whether the plaintiffs were in a situation in which they had a choice. If they had no choice they could be bound by no election. The situation is clear. There was a breach of a condition of the lease which gave the plaintiffs the right of reëntry. They elected to terminate the lease, gave the proper notice, and brought their proper action. They obtained judgment for restitution. The defendant appealed, and gave its undertaking. This undertaking bound it to pay the rent, and gave it the right to remain in possession during the pendency of the appeal. The plaintiffs had no option in the matter. It is clear that from that time the occupation of the defendant was against the consent of the plaintiffs. It was not referable to the lease, but to the situation created by the appeal and undertaking, and could be no proper evidence that the plaintiffs had elected to waive their right to terminate the lease. So the payment and receipt of the rent are referable to the situation, and not to the plaintiffs' choice. The law does not intend the absurd conclusion that the plaintiffs must forego all rents during the pendency of the appeal, under penalty of forfeiting all their rights in the action. It has been at too much pains to secure such rents to them for that conclusion. That a party abides by a situation in which the law places him is no evidence that the situation is of his choice, nor binding upon him as an election."

But however sound this position may be with respect to the acceptance of the December and January rents, under the circumstances here disclosed, the fact remains that the November rent was accepted after the breach, and with full knowledge thereof, and before suit was brought.

This would constitute a waiver of the only breach which has been passed upon by the jury. "Where forfeiture of a lease is incurred by nonpayment of rent, if the lessor receive from the lessee rent subsequently accruing the forfeiture is thereby waived." *Richburg v. Bartley,* 44 N. C., 418.

Therefore, under the facts of the instant case, we think the judgment of his Honor must be upheld.

No error.

SUMMIT AVENUE BUILDING COMPANY v. J. P. SANDERS ET AL.

(Filed 26 April, 1922.)

1. Contracts, Written—Breach—Stipulated Damages—Parol Evidence.

The written contract between the plaintiff and defendants in express terms leased to the defendants a town lot of plaintiff's under the defendants' unconditional agreement to form a hotel company in ten days, and erect thereon in a specified time a hotel at a certain cost, with the privilege of buying, etc., and that the defendants execute a note for the amount of the first year's rent, which should become the property of the plaintiff in the event the defendants failed to comply with the obligations they had assumed. The defendants did not deny execution of the contract or its breach by them: *Held,* their defense that it was contemporaneously agreed by parol, that the transaction should not be effective should the defendants fail to organize the company within the ten days agreed upon was inadmissible as varying the terms of the writing, and being liable for the first annual rent they could not take advantage of their own default in not giving the note.

2. Same—Evidence—Admissions—Instructions—Verdict Directing.

Where the plaintiff's evidence is sufficient to sustain his allegation for damages for breach by the defendants of their contract, and the defendants have not interposed or offered sufficient evidence of a valid defense, a verdict in the plaintiff's favor should be directed by the court.

APPEAL by plaintiff from *Long, J.,* at February Term, 1922, of GUILFORD.

Civil action to recover damages for an alleged breach of contract, the material parts of which are as follows:

GREENSBORO, N. C., 25 October, 1919.

Memorandum of agreement between J. P. Sanders and W. E. Hockett, called the lessees, and Summit Avenue Building Company, called the lessors:

The lessees agree to form a hotel company, to be known as the North Carolina Hotel Exchange Company, within ten (10) days from this date.

The lessors agree to lease to said hotel company all that lot and parcel of land in Greensboro, N. C., at the southwest corner of Greene and Washington streets, being about 113.30 feet on the south side of Washington Street, and 125 feet on the west side of Greene Street, for a period of eight years, at an annual rental of $6,000, payable in advance 1 January of each year, beginning 1 January, 1920. First payment to be made by promissory note of said lessees and their associates, payable 1 July, 1920, with interest at six per cent from 1 January, 1920; lease to provide that hotel company, which is the lessee therein, shall have the option at the beginning of the ninth year, to purchase said property and hotel thereon for $8,775, payable 1 January, 1928. This option to be exercised at any time after 1 January, 1927, and is conditional on all the terms and conditions of this contract and lease to hotel company being fully performed and complied with.

It is an essential part of this agreement and to be a condition of said lease, that the lessees of said hotel company cause to be erected on said premises a hotel of in the neighborhood of 200 rooms and to cost approximately $350,000 or more for the building, and to furnish same with furniture and equipment to cost approximately $100,000.

The note above referred to is to stand as security for the starting of the erection of said hotel on or before 1 July, 1920, and in event of failure to start erection of hotel within that time, this agreement and lease thereunder to be and become null and void, but said note, nevertheless, to be paid by the makers thereof to the Summit Avenue Building Company.

It is understood and agreed that a formal lease is to be executed by the Summit Avenue Building Company to the hotel company embodying the above terms and conditions, and further containing the covenants by the lessees to pay all State, county, municipal, or other taxes or assessments against said property or assessments for paving streets or sidewalks adjacent thereto. Said property shall not be used during continuance of lease for any purpose other than hotel purpose, except it may have a barber shop or other stores in hotel building, and in order to entitle the lessee to exercise option and purchase said property at end of the eight years, the hotel as herein above specified, must be fully built and completed during the period of lease.

Plaintiff alleges that the defendants, after entering into the foregoing agreement, failed and refused to perform their part of the contract by declining to form the hotel company and by refusing to execute the rental note as contemplated by the memorandum of agreement. This suit is to recover the sum of $6,000; plaintiff contending that under the terms of the contract said amount was to be paid in any event.

From a verdict and judgment in favor of the defendants, the plaintiff appealed.

J. S. Duncan and R. C. Strudwick for plaintiff.
Cooke & Wyllie and A. L. Brooks for defendants.

STACY, J. The execution of the contract here sued on is admitted by the defendants; but they alleged that it was further understood and agreed between the parties, at the time of the making of said memorandum of agreement, that if the hotel corporation were not organized within the stipulated period of ten days, "the whole business would be off, and that there should be nothing to it, and that it would not be binding on any one." There is no allegation of fraud or mistake.

It will be observed that this alleged oral contemporaneous agreement is at variance with and contradicts the terms of the written contract. The defendants, therefore, are not in position to show it by parol evidence. *White v. Fisheries Co., ante,* 228, and cases there cited. The first year's rent of $6,000 was to be paid on 1 January, 1920. It is true the contract provided that this might be arranged by the execution of an interest-bearing note, payable 1 July, 1920; but it was further stipulated that in the event the undertaking proved to be a failure, nevertheless the rental note in question was to be paid to the plaintiff. The note was not executed, but this was a breach of the agreement by the defendants themselves, and hence they are not in position to take advantage of it. To permit the defendants to show that the entire contract was to become null and void upon their failure to organize the hotel company within the given period of ten days would be to allow the defendants to annex a condition subsequent to their agreement and in direct contradiction of the express stipulation of the written instrument. This may not be done under our rules of procedure. *Bowser v. Tarry,* 156 N. C., 39.

The defendants having admitted the execution of the contract, and failing to allege or to show any valid defense to its enforcement, it follows that his Honor should have directed a verdict in favor of the plaintiff.

New trial.

W. S. GATEWOOD v. C. C. FRY.

(Filed 26 April, 1922.)

1. Deeds and Conveyances—Timber—Reservations—Purchasers of Land —Contracts—Breach—Evidence—Nonsuit.

The owner of lands conveyed the timber growing thereon to the defendant with right to cut and remove the same within a term of years, but with further provision that a purchaser of the land from him, upon six months written notice, would have the right to clear such acreage as he should designate, leaving the remainder for the defendant under the provisions of his timber deed. In the purchaser's action for damages, wherein an injunction has been issued, evidence, without more, tending to show that the plaintiff had bought the land on speculation, without intention to clear it, and that his purchaser had refused the land because of the dispute, is insufficient to sustain the plaintiff's action, and a motion as of nonsuit thereon was properly granted.

2. **Deeds and Conveyances—Timber—Contracts—Breach — Limitation of Actions—Statutes—Pleadings—Counterclaim—Damages.**

Where it appears that a purchaser of timber standing upon the land would have cut and removed the same within the time specified for that purpose, except for an injunction erroneously issued in the suit of the plaintiff: *Held*, C. S., 413, does not have the effect of extending the period of time for cutting and removing the timber fixed by the terms of the contract, and the defendant's damages, arising or growing out of the same transaction, may be pleaded as a counterclaim, and it is permissible to ascertain and award the same, to the time of the trial, it being the full net value of the timber, of which he has been deprived.

APPEAL by plaintiff from *Lane, J.*, at December Term, 1921, of MOORE.

Civil action, instituted by issuance of summons of date 24 February, 1919, which was served on 4 March, 1919, and the purpose is to recover damages of defendant for wrongfully cutting timber trees from lands claimed by plaintiff, and to restrain defendant from further cutting till the hearing, an injunction order restricting any further cutting till the final hearing being issued and served on defendant in the cause. There was answer filed denying any wrongful cutting of timber as alleged, and a further answer by way of counterclaim for damages suffered by defendant by reason of wrongful interference with defendant's cutting and carrying off of said timber, alleged by defendant to be in pursuance of his rights of ownership in said timber. At the close of the evidence, on motion, there was judgment of nonsuit as to plaintiff's cause of action, and on issue submitted as to amount of defendant's counterclaim, there was verdict in defendant's favor for $350. Judgment on the verdict for defendant and plaintiff excepted and appealed.

U. L. Spence for plaintiff.
H. F. Seawell for defendant.

HOKE, J. From the facts in evidence it appears that the land and timber thereon belonged to Mrs. Maggie H. Graves, and that on 17 October, 1916, she and her husband, by deed properly proven and registered, conveyed to defendant C. C. Fry the merchantable timber on said land, with right to cut and remove same within three years from the date of the instrument, and as a limitation on this right of three years to cut and remove, the deed contained the following: *"Provided,* that the parties of the first part do not sell and convey said lands during said period, and in the event that said parties of the first part sell and convey said lands on which said merchantable timber suitable for making merchantable lumber and crossties are located and situated, then and in that event, if the party to whom the parties of the first part sell and convey said lands desire to use and clear any of said lands for farming purposes, or any other purposes, then he or they are to give the party of the second part, his heirs or assigns, six months notice in writing of his or their intention of wanting to use said lands, or the number of acres on said tract of land, and the party of the second part agrees to either cut the remaining said timber situated on said tract of land, or the number of acres indicated and designated by the said purchaser, which he wants to clear, or to move off of said portion of said tract of land and release all claims and rights to any timber on said lands stipulated and designated in said written notice."

It further appears that on 17 July, 1918, Mrs. Maggie Graves and her husband sold said land to plaintiff for $850, $100 of which was paid down, and balance evidenced by plaintiff's note for $750, which has not been paid, and said parties executed their bond to make title to said land on payment of purchase price. Proper probate of said paper was had and same put on registry 10 March, 1919. On obtaining the bond for title, plaintiff caused a notice to be written and served on defendant on 7 August, 1918, in terms as follows: "This is to notify you that I have bought the land owned by Mrs. Maggie H. Graves near Bethlehem Church on which you bought her crossties, and if you have not already removed all the timber, which you bought from her, which was on this land, you will do so in the next six months, as I shall take charge of this timber and land at that time, and shall not allow any more to be removed by you, as per your contract with Mr. G. C. Graves and Mrs. Maggie H. Graves, as I shall desire to use all of said land for farming purposes and other purposes. This is your notice, as per said contract."

There was also evidence tending to show that defendant could and would have cut and removed all of the timber within the six months after notice given, and further, that some of the timber had been cut by defendant after expiration of the six months notice and before injunction ordered served.

Plaintiff, among other things, testified, in effect, that he had bought the land on speculation, intending to sell same to the four Diggs boys, and that plaintiff had no intent or purpose to clear any part of the land himself; that the Diggs boys had said that they were going to clear it, but refused to take the land when they found there was a dispute about it, etc.

There was evidence for plaintiff that the value of the timber on the land when time for notice expired was from $150 to $225. There was evidence for defendant that the value of the timber on the land at the end of the six months, and which defendant was prevented from cutting by restraining order, etc., was from $700 to $1,000.

Upon this testimony chiefly pertinent, the court, on motion, as stated, entered judgment of nonsuit as to plaintiff's cause of action, and submitted an issue as to amount of damages suffered by defendant by "reason of matters set up in the answer, and on account of the restraining order and injunction issued in the cause." The jury, in response to the issue, have answered the damages of defendant at $350. There was judgment on the verdict, and no reason is shown for disturbing the results of the trial.

From the facts in evidence we are of opinion that plaintiff had acquired no such interest in the timber and had no such purpose concerning the property as gave him the right by six months notice to terminate or shorten the time for cutting and removing the same, held by defendant under his contract. From a perusal of the stipulation, it is clear that such right is restricted to an owner at the time, whose purpose was to clear and cultivate or improve it, and then only to the extent of the proposed clearing required for improving. "In case of sale, if the persons to whom same is conveyed desire to use or clear said land for farming purposes or any other, notice shall be given of their intention to use same or the number of acres thereof," is the language of the stipulation.

Plaintiff, a witness in his own behalf, testified, in effect, that he bought and held the land for speculation, and had no intent himself of clearing the same, or any part of it; that he had never sold, nor does it satisfactorily appear that he had ever made any binding contract to sell, to the Diggs brothers, nor is there any notice from them of any desire or intent on their part to clear said land. The plaintiff's own testimony shows that his notice is not efficient for the purpose intended, and defendant, therefore, under his purchase, had until 17 October, 1919, to cut and remove the timber, and plaintiff's cause of action has been properly dismissed as on judgment of nonsuit.

As to the counterclaim, C. S., 413, which provides that when commencement of action is stayed by injunction, the time of the continuance of the injunction is no part of the time limited for the commencement of the action, as its terms clearly import, affects, and is intended to affect only a litigant's right to prosecute an action in court as fixed by the statute, and does not as a rule operate to extend or prolong a time limit or a property right as determined by the contract of the parties. 25 Cyc., 1284, citing *Paul v. Fidelity Cas. Co.*, 186 Mass., 413; *Wilkerson v. Fire Insurance Company,* 72 N. Y., 499.

Defendant, therefore, being in a position to cut and remove this timber within the time limit of the contract, and his right to do so having been wrongfully stayed by injunction until such time had expired, is entitled to recover the full net value of the timber as damages for such wrongful interference. *Williams v. Parsons,* 167 N. C., 529.

In the *Williams case,* just cited, the interference complained of was by conduct *in pais,* but as to the award of damages, there is no distinction in principle between that and a case where the wrongful interference was under color of court process, which was procured on a baseless claim.

And the counterclaim being one arising out of the same transaction, or growing out of some controversy, it is permissible to ascertain and award the amount down to the time of trial. *Smith v. French,* 141 N. C., 1.

We find no error in the proceedings, and the judgment for defendant is affirmed.

No error.

ALFRED R. HARE v. FRANKLIN S. HARE.

(Filed 26 April, 1922.)

Costs—Equity—Statutes—Appeal and Error.

The *locus in quo* was formerly owned by the father of the plaintiff and defendant, the former claiming an undivided half thereof under their parent's deed conveying the lands to each of the parties upon consideration of support, which the plaintiff alleges he has performed, and that the defendant has not, the latter claiming the entire tract from his parents under a prior deed. Upon a trial without error the jury found that each was entitled to an undivided half in the land, and the appeal being from taxing the defendant with costs, there being no element of an action in ejectment, *it is held,* error, neither party being permitted to recover costs from the other, C. S., 1243, especially, as in this case, the question being of an equitable nature, the taxing of costs is in the sound discretion of the court; and they are taxed equally against both parties.

APPEAL by both parties from *Lane, J.,* at December Term, 1921, of MOORE.

H. F. Seawell for plaintiff.
U. L. Spence for defendant.

CLARK, C. J. This was an action between two brothers over the home place of their father, containing 48 acres, lying between a 50-acre tract on one side, which he had given to the plaintiff, and a 50-acre tract on the other side, which he had given to the defendant. The plaintiff claimed through an alleged deed for this 48-acre tract from the parents to him; the defendant denied such deed was ever delivered to the plaintiff, and likwise alleged that the parents of the parties and the plaintiff and defendant had all joined in the execution of a deed or paper-writing of later date by the terms of which the plaintiff and the defendant were each to care for their parents during their natural lives, and after their death the plaintiff and the defendant should own the land as tenants in common, but if either son failed to contribute to the support of parents, as therein provided, and the other did, the son so contributing should have the whole of the land. The defendant alleged that he had fulfilled his part of the contract, and that the plaintiff had not, and hence the defendant should be declared the owner of the whole interest in the land.

Upon the issues duly submitted the jury found that:

1. The deed executed by K. H. Hare and his wife to the plaintiff for the 48 acres of land described in the complaint was never delivered to the plaintiff.

2. The defendant Franklin S. Hare contributed to the support of his father during his lifetime, as alleged in the answer.

3. The plaintiff Alfred R. Hare contributed to the support of his father during his lifetime, as alleged.

4. The plaintiff is the owner of one-half interest in the 48 acres described in the complaint.

The court entered a decree reciting that by virtue of the deed executed 27 July, 1904, between plaintiff and defendant and their father and mother, duly recorded, the plaintiff is owner in equity in a fee-simple undivided interest in the 48 acres of land described in the complaint; and that the defendant is the owner in equity and in fee simple of the other one-half undivided interest in the said tract of land, and entered a decree that each party should so hold a one-half undivided interest in the premises and the judgment should be a release on the part of each of any other interest in said 48 acres beyond the one-half undivided interest of each in pursuance of the verdict and the judgment of the court. In the verdict of the jury and the judgment of the court we find no error, except as to the costs, which were adjudged against the defendant.

The chief controversy seems to be in regard to the costs, which, as is not unusual, has become the chief concern in this litigation. This was not an action of ejectment, and the plaintiff did not recover on such claim, but his demand for judgment was that "the rights of plaintiff and defendant, with respect to said 48 acres of land, be declared by the court." The defendant set up a counterclaim that he be declared the sole owner of the whole tract of 48 acres. Neither party recovered anything from the other under the verdict of the jury. The judgment of the court being that each was entitled to an undivided half interest, the costs should be divided, C. S., 1243, especially as the action being in the nature of an equitable proceeding, the costs rest in the discretion of the court. *Simmons v. Allison,* 119 N. C., 557.

In *Wooten v. Walters,* 110 N. C., 259, the Court held that where an action is not strictly for the recovery of real or personal property, costs will be allowed in the discretion of the court.

The action, in effect, has been in the nature of an equitable proceeding, and in such case the adjudication of the costs is in the discretion of the court. *Parton v. Boyd,* 104 N. C., 422; *Yates v. Yates,* 170 N. C., 536. In *Gulley v. Macy,* 89 N. C., 345, it was held that there had been no recovery of land by plaintiffs, within the strict meaning of the statute, but that the judgment was of an equitable nature and the court was authorized to adjudge the costs one-half against each party. There are numerous other decisions which can be cited in support of a similar ruling as to costs.

The costs will be paid one-half by the plaintiff and one-half by defendant, respectively.

Modified and affirmed.

N. L. GIBBON v. CYNTHIA E. LAMM.

(Filed 26 April, 1922.)

1. **Fires—Negligence—Employer and Employee—Master and Servant—Evidence—Instructions—Nonsuit—Trials.**

   Where the owner of land built a fire on his pasture himself, or by his servants or agents, and there is evidence that a strong wind carried sparks and set fire to a woods adjoining the pasture from whence it was communicated to the plaintiff's land to his damage, and that the owner had instructed his servants or agents to put out the fire, which they had disobeyed, the case presents a mixed question of law and fact, the jury to find the facts under a correct instruction of the court as to the law; and the granting of a motion as of nonsuit is erroneous.

2. **Same—Proximate Cause.**

   Where the owner of land builds a fire on his own premises, it is required of him to exercise the care of an ordinarily prudent man to prevent its communication to adjoining lands under the existing circumstances, whether through the air or along the ground, and he is also liable for the negligence of his servants or agents whom he has left in charge, when his own, or their negligence attributable to him, is the proximate cause of the damage to the lands of adjoining owners, or to others beyond, to which the fire has been communicated, the question of proximate cause being a question for the jury under proper instructions from the court.

APPEAL by plaintiff from *Lane, J.,* at December Term, 1921, of MOORE.

This action was brought to recover damages for the negligent setting out of fire by the defendant, the plaintiff alleging that the fire spread to his premises and burned his property, and that he was thereby damaged.

At the close of the plaintiff's evidence the defendant demurred thereto and moved to dismiss the action, and the court allowed the motion and dismissed the action, and plaintiff excepted. This is the only question in the case. The matter before the court is simply the sufficiency of the evidence, and whether it ought to have been submitted to the jury. There was evidence that the fire which destroyed the plaintiff's property was set out by the defendant, and it was also sufficient to show that it spread to the property of the plaintiff and burned it, and he thereby suffered damage.

We will state briefly so much of the testimony as is pertinent to the ruling of the court dismissing the action.

J. W. Phillips testified: "The fire was in the pasture. There was no woods inside the pasture, but woods adjoining the pasture on the northeast side, and that is how the fire got out. The woods next to the pasture were burned."

N. J. Patterson testified: "I know where Mr. Lamm and his wife lived, and where the fire was. I know Mr. Gibbons' place also. I live about halfway between Mr. Gibbons' place and Mr. Lamm's place, and lived there at the time the fire occurred. The fire burned me out. It came to my house from the southwest, and that was in the direction of Mr. Lamm's. The fire occurred near 2 o'clock, 1:30, or somewhere along there. The wind was blowing strong. The wind was coming from toward Mr. Lamm's premises, coming that way. The fire was between four and five hundred yards from my house when I saw the blaze. Coming a little to the left of my premises, between me and the graded road. The fire was going in the direction of Mr. Gibbons' premises. Mr. Gibbons' premises were about two miles from my place. It was sometime before I went over to Mr. Gibbons' after the fire occurred, two or three weeks, I suppose. Everything was burned from my place over there. Some buildings were burned, I noticed. It burned some property for me, and I thought at the time that I was hurt worse than any one else, burned a lot of my dry oats and feed. I didn't go any time after the fire from my premises to Mr. Lamm's. I live about two miles from Mr. Lamm's. The general character of the country between my place and Mr. Lamm's is wire grass and black jack and a little lightwood. Mr. Lamm had a conversation with me about the fire. He came to see me three times to see the damages that was done, and I was wanting him to pay me right smart damage, and he said he wasn't able. He settled the matter with me and gave me $10. He spoke to me about the fire and stated that he had colored fellows there and they left for dinner and the wind got up and he told them to secure it, and they never went back to see until it got out. I don't think he was there himself. That is what I heard. Mr. Lamm told me that. He said he left the colored fellows and told them to secure it, and they went to dinner and the fire got out while they were at dinner. He told me that the colored fellows were burning some black jacks for the purpose of getting the ashes."

There was other testimony tending to show that the fire was started in the pasture of the defendant, and burned from there connectedly and continuously to plaintiff's land and there burned his property, for the loss of which plaintiff brings this suit.

Judgment was entered in the case dismissing the action, and plaintiff appealed.

U. L. Spence for plaintiff.
H. F. Seawell for defendant.

WALKER, J. The court erred in withdrawing the case from the jury and ordering a nonsuit, as there was some evidence under which the plaintiff was entitled to have the issues submitted to a jury. It appears that the fire was originally set in the pasture and there was testimony to the effect that it was in cleared land, but there also was some that woodland adjoined the pasture on one side of it and it was by communication of the fire to the woods that "it got out and spread to the other land." Whether it was negligent in the defendant to have started the fire, by himself or through his agents or servants, in the pasture, for the purpose of burning the blackjacks to get potash, or, having started it, to have failed after the wind rose with such force and violence as to endanger the premises of adjoining proprietors, to keep the fire under control and prevent it from spreading to other land and destroying the timber thereon, was a mixed question of fact and law, the findings of fact being for the jury, and the law applicable to the facts as found by them being solely a question for the court. If the fire was negligently set, or ordinary care was not exercised on the defendant's own land, and this was the proximate cause of the injury to the plaintiff's property, the defendant would be liable. "In general it may be said that a person is not liable for damages caused by a fire in the absence of negligence in its use. One may lawfully kindle a fire on his own premises for the purpose of husbandry, and he is not liable for injury caused by it to the property of another in the absence of negligence in its management. Ordinary care and caution is all that is required; that is, the fire should be kindled at a proper time, under ordinarily favorable circumstances and in a reasonably prudent manner. The owner will of course be liable for injuries from negligence in starting fires or in not using proper precautions to prevent their spread. He is not at liberty to kindle fires, when on account of the time, manner, or circumstances it appears probable that damage to others will result, such as setting it in a dry time, or without guarding it sufficiently to prevent its spreading. Nor should he set it near the property of another in matter through which it is likely to spread to such property from inflammable matter. It is immaterial whether the negligence consisted in the time or manner of kindling or the means used to prevent its spread, and where a fire is negligently kept it is immaterial in what manner it spreads to the premises of another." 29 Cyc., 460-461. The following instruction to the jury was given in *Higgins v. Dewey*, 107 Mass., 514, a case somewhat similar to this one, and held to be correct, and sufficient: "That to maintain his action the plaintiff must prove that the fire which occasioned the damage to his wood was communicated thereto from the fire which the defendant had set on his own land, and that the defendant in burning his brush did not use due and reasonable care in setting the fire, and in said burning did not use due and reasonable care and diligence to control the fire and prevent its escape and communication to the adjoining and surrounding lands; and that the burden of proof upon both these propositions was upon the plaintiff." The Court there held, by *Justice Gray*, that if a man who negligently sets fire on his own land, and keeps it negligently, is liable to an action at common law for any injury done by the spreading or communication of the fire directly from his own land to the property of another, whether through the air or along the ground, and whether he might or might not have reasonably anticipated the particular manner and direction in which it is actually communicated, citing numerous cases in support of the proposition.

But the case goes beyond this, as N. J. Patterson gave testimony from which the jury may have reasonably inferred, and found, that the escape of the fire from the defendant's premises was due to the negligent failure of his servants or agents in not preventing the escape of the fire and its spread to other land, as he had instructed them to do, after the wind rose and made it dangerous for the fire to be unguarded. Instead of doing so they went to the house for their dinner, and when they returned, it was too late, as the jury may have found, to stop the fire and save plaintiff's property, which was burned.

We said in *Caton v. Toler,* 160 N. C., 104, that the rule of care required of the defendant to prevent the escape of the fire from his own land to that of plaintiff is the ordinary care that a reasonable and prudent person would have exercised under the existing or similar circumstances. In *Averitt v. Murrill,* 49 N. C., 323, a case relied on by the plaintiff, the court charged the jury correctly, as this Court said, that the defendant who had set out the fire would be responsible for his own negligence, of course, and also for that of his agents, or servants, which had caused the injury.

The question of proximate cause was for the jury, under proper instructions from the court, and would depend upon the circumstances under which the fire was started and communicated to plaintiff's land, where his property was destroyed by it. Ordinarily what is the proximate cause of an injury is a question for the jury, aided of course by instructions from the court as to the law bearing upon it. *Railroad Co. v. Kellogg,* 94 U. S., 469.

There was error. The nonsuit will be set aside and a new trial had.

New trial.

R. A. KENDALL v. PINNIX REALTY COMPANY.

(Filed 26 April, 1922.)

Parties—Actions—Fraud—Contracts—Specific Performance—Deeds and Conveyances—Statute of Frauds—Statutes.

The plaintiff and another entered into a written contract of purchase of defendant's land, sufficient to bind the latter under the statute of frauds, C. S., 988, and the plaintiff alone brought this action, alleging fraud, and seeks to recover back the part payment of the purchase price made thereon by himself and the other person interested, who has not been made a party: *Held,* by his action the plaintiff repudiated the contract and renounced his right to specific performance, and such other person having an equitable interest in the subject of the action is a proper party with a right to assert such equity and to have the entire controversy settled in one action. C. S., 457.

APPEAL by defendant from *Finley, J.,* at September Term, 1921, of RICHMOND.

The defendant contracted to sell to the plaintiff and his father, J. A. Kendall, a tract of land, situated in Anson County, and executed the following receipt: "Received of Mr. R. A. Kendall and J. A. Kendall, on 8 July, 1920, $500, as part payment on 121 acres of land of Mr. M. L. Ross place at $65 per acre, 2½ miles north of Polkton on the Polkton graded road.

"Balance of one-half payment to be paid by 1 January, 1921, which is $3,432.50.

PINNIX REALTY COMPANY,
J. C. Flowers, *Manager.*"

Plaintiff alleged that he paid the $500 named in the receipt, and that the payment was induced by fraud. Denial by the defendant. Issues as to the alleged fraud and damages were answered in favor of the plaintiff, and from the judgment rendered the defendant appealed.

J. Chesley Sedberry for plaintiff.
Fred W. Bynum for defendant.

ADAMS, J. Since the evidence for the plaintiff tends to support the cause of action set out in the complaint the motion to nonsuit was properly denied; but the rights of all the parties to the contract cannot be determined in a controversy solely between the plaintiff and the defendant. As we understand the record, the parties admit that as to the defendant the receipt introduced in evidence is a sufficient compliance with the statute of frauds, and that against the defendant specific performance may be enforced. But the plaintiff contends that neither he nor his father is bound by the receipt, and that either of them has the right to repudiate the alleged contract. C. S., 988; *Burris v. Starr,* 165 N. C., 657; *Lewis v. Murray,* 177 N. C., 17. Accordingly, the plaintiff prosecutes this suit to recover the amount paid as a part of the purchase price of the land. In doing so he repudiates the contract and renounces his right to demand performance by the defendant. It will be noted that the defendant acknowledges receipt of the $500 from both the plaintiff and his father. The latter, who is not a party to the suit, appears to have an equitable interest and a right to assert it in this action, and it does not appear that he has voluntarily abandoned his rights. Besides, the defendant is entitled to an opportunity to have the entire controversy settled in one action. J. A. Kendall should therefore be made a party. If he is unwilling to become a coplaintiff, summons may be issued against him as a defendant. C. S., 457. To this end a new trial is necessary. Let this be certified as provided by law.

New trial.

ATLANTIC COAST LINE RAILROAD COMPANY v. TOWN OF DUNN.

(Filed 3 May, 1922.)

1. **Limitation of Actions — Title — Adverse Possession — Color—Public Squares—Dedication—Acceptance—Statutes.**

Where the owner of lands has platted them into streets and a public square, and sold them to various purchasers with reference thereto, who have made improvements on the lots so purchased, and there is evidence that the sale was made in anticipation of the location of a town which was soon thereafter built, and that it had accepted the dedication of the streets and public square so platted; and that the original owner subsequently had conveyed this open square to a railroad company which had continuously used it more than seven years for the purposes of a depot: *Held*, upon the question of the title of the railroad claimed by adverse possession under the color of its deed, it is reversible error for the judge to charge the jury that should the railroad company, the plaintiff in the action, have held adverse possession under known and visible lines and boundaries, under color, it would ripen its title, such being contrary to the provisions of Laws 1891, ch. 224 (C. S., 435).

2. **Same—Instructions—Appeal and Error.**

An erroneous charge that the title to an open square, dedicated to and accepted by a town, would be acquired by seven years adverse possession under known and visible lines and boundaries, contrary to the provisions of our statute, C. S., 435, is not cured alone by a full and complete charge on the principles of an offer to dedicate and an acceptance of the square by the town.

APPEAL by defendant from *Cranmer, J.*, at November Term, 1921, of HARNETT.

Civil action to establish plaintiff's ownership in an open square in the town of Dunn, abutting on the railroad's right of way through said town, and to restrain defendant from trespass and other wrongful interference with plaintiff's rights therein. Defendant denied plaintiff's ownership of the property, and in a further answer averred that said square had been dedicated as a public square and accepted as such by the town authorities before plaintiff had or claimed any right therein, and prayed for an injunction restraining plaintiff from alleged wrongful trespass or use of said square. The cause was submitted and verdict rendered on the following issue:

"Is the plaintiff the owner in fee simple, and entitled to the possession of the land described in the complaint? Answer: 'Yes.'"

Judgment on the verdict for plaintiff, and defendant excepted and appealed.

Rose & Rose for plaintiff.
Godwin & Williams and Younce & Best for defendant.

Hoke, J. There was evidence to the effect that in 1886 one Henry Pope, admitted to be the owner, conveyed to H. Walters and J. B. Edgerton 37½ acres of land, covering the land or square in controversy. That in 1892 said Walters and Edgerton conveyed said property, or the portion of it that contained the square, to the East Carolina Land and Improvement Company. That on 28 May, 1907, said land and improvement company conveyed the land in dispute to plaintiff, and said plaintiff had occupied and controlled the said land, asserting ownership under its deed since said date. There was evidence on the part of the defendant tending to show that said Walters and Edgerton, while owners of said property in fee, made a subdivision of a portion of said 37½ acres, which subdivision included the *locus in quo,* divided same into streets, alleys, blocks, with a public square, for the purpose of creating the present town of Dunn. That a blue-print was made of the property showing the lots as an open public square, and in 1887 said parties conducted an auction sale of numbers of these lots, at which it was stated that the site was to be and remain an open square, etc., lots were sold, and deeds made as adjoining said square. And it was publicly announced at the time that the square would never be sold, but would be and remain a public square for the use and convenience of the public. And there were facts in evidence permitting the inference that some of the railroad officials and others largely interested as owners of the stock were present at the sale and acquiescing in these assurances. There was further evidence for the defendant that the authorities of the town of Dunn, which was incorporated in 1887, had accepted the dedication of the property in controversy as a public square. That in 1892 it had caused an official map of the town to be made, naming the streets, blocks, etc., largely following the plat as made by Walters and Edgerton and recognizing the property in dispute as a public square, designated as Lucknow Square, so named in said official record of maps of the town. That some of the lots sold as abutting on the square had been improved by the owners, and the city had constructed concrete sidewalks on the western side of the property, and has paved the western edge as a street and had extended Cumberland Street through the property and paved the same, and other uses had of the square shown for the benefit of the general public. Upon this opposing testimony, the court charged the jury, among other things, as follows, and which was duly excepted to by appellant:

"The plaintiff contends that it is the owner in fee of the land, and that it has been in the continuous, quiet, and peaceable possession of the land since 1907, about eleven years, and that the title extends back an unbroken chain to the Pope deed to Walters and Edgerton in 1886, about thirty-two years, and that it, and those under whom it claims, have now occupied and held adversely to all persons the land in question. I instruct you, gentlemen of the jury, that seven years adverse possession under known and visible lines and boundaries, and under color of title, will ripen title, and be a bar to all persons if no disability, and there is no evidence of disability in this case of any person being under disability."

The true title having been admitted to be in Henry Pope, that as an abstract proposition is correct, but when considered in reference to the facts in evidence, and the opposing positions of the parties arising thereon, we are of opinion that this instruction is erroneous. In 1891, chapter 224, the Legislature, changing the law as it had formerly prevailed, enacted a statute, now appearing in C. S., 435, as follows: "No person or corporation shall ever acquire an exclusive right to any part of a public road, street, lane, alley, square, or public way of any kind by reason of any occupancy thereof or by encroaching upon or obstructing the same in any way, and in all actions, whether civil or criminal, against any person or corporation on account of an encroachment upon or obstruction or occupancy of any public way it shall not be competent for a court to hold that such action is barred by any statute of limitations." Under the provisions of this statute, the effect of which, on the law as it formerly existed, is referred to in *Threadgill v. Wadesboro,* 170 N. C., 641, and other cases. If the defendant's evidence is accepted by the jury, and there was a completed dedication of the square, the right of the public therein was immediately established and thereafter a title by adverse possession could no longer be acquired or maintained against it. In *Haggard v. Mitchell,* 180 N. C., 255; *Wittson v. Dowling,* 179 N. C., 542; *State Co. v. Finley,* 150 N. C., 726; *Tise v. Whitaker,* 146 N. C., 374. True, the court in its further charge made elaborate, and in the main a very correct statement of the law appertaining to dedication and acceptance of these public easements, but he nowhere modifies the charge as above set out, or instructed the jury that in case a completed dedication is established, a title by adverse possession could, under no circumstances, prevail against it. Standing alone and without further statement or explanation, the charge could very well be interpreted to mean that notwithstanding a previous dedication and acceptance, if plaintiff had thereafter shown adverse possession, under known and visible lines and boundaries for seven consecutive years, it would be a valid title. It is not unlikely that the charge excepted to was so understood by the jury, and in our opinion, as stated, must be held for prejudicial error entitling defendant to a new trial.

Venire de novo.

O. M. RUTLEDGE, TRADING AS RUTLEDGE & COMPANY, v. A. T. GRIFFIN MANUFACTURING COMPANY.

(Filed 3 May, 1922.)

1. Limitation of Actions—Adverse Possession—Husband and Wife.

Where the husband owns or has title to the *locus in quo*, his living thereon with his wife is his sole possession in regard to the question of title ripened by adverse possession, and the principle upon which it is regarded as that of his wife when she owned the title and he claims under a void deed from her, as decided in *Kornegay v. Price*, 178 N. C., 441, does not apply.

2. Trespass—Standing Timber—Damages—Boundaries.

Where the plaintiff claims timber growing upon lands by adverse possession of the lands, depending upon whether defendant's boundary was the high- or low-water mark of a stream, it is competent for the plaintiff to show the location of the high-water mark, and where the land alleged to have been trespassed upon was situated, and not only what damages had been done to it from the cutting and removing of the trees, but how and to what extent, if any, the remaining land had been injured or depreciated by the defendant's alleged trespass.

3. Same—Evidence.

Where the plaintiff brought an action in the nature of an action for trespass and for damages for the defendant's cutting and removing timber standing upon the lands, which he claims by adverse possession, depending upon the location of defendant's boundary line, testimony of the defendant's grantors that he had altered his deed with respect to this boundary is competent upon the question of defendant's good faith in claiming the lands and denying trespass, and as impeaching the validity of the defense and showing the true location of defendant's boundary; though not with reference, in this case, to its legal effect upon the continued validity of the defendant's deed.

4. Evidence—Cross-examinations—Impeachment—Damages—Trials.

Where the defendant corporation has denied the trespass and the wrongful cutting and removing timber upon the plaintiff's land, and its general manager has testified as to the comparative value of the timber, it is competent for the plaintiff to cross-examine him as to those matters to test the value of his testimony as to the value of the land, timber, etc., and also to show his animus, feeling, or bias.

5. Appeal and Error—Evidence—Objections and Exceptions—Broadside Exceptions.

Exceptions to testimony, to be considered on appeal, must not be to several distinct parts without particularly indicating the ground of objection.

APPEAL by defendant from *Lyon, J.*, at January Term, 1922, of DUPLIN.

John A. Gavin, Jr., and Rouse & Rouse for plaintiff.
Stevens, Beasley & Stevens and Teague & Dees for defendant.

WALKER, J. This is an action, in the nature of an action for trespass, to recover damages from the defendant for cutting and removing timber from that portion of the plaintiff's land, known as the J. F. Watkins tract of land, which lies between Poley Branch and the high-water mark of the mill-pond lying north of the Poley Branch. The plaintiff acquired the title to this timber by *mesne* conveyances from J. F. Watkins for the timber of the J. F. Watkins tract of land, which included the timber alleged to have been unlawfully and wrongfully cut and removed by the defendant, that is, the timber in controversy being on the land between the Poley Branch and the high-water mark of the branch on the north side, and the jury found that the defendant committed the trespass by cutting and removing the timber, as alleged.

In order to establish ownership of the timber, the plaintiff introduced evidence tending to show that J. F. Watkins had been in the adverse and continuous possession of the land for more than forty years before his death in 1913, claiming it as his own and as belonging to him in his own right, and the case was submitted to the jury by the court only in this view, that is, whether J. F. Watkins had acquired title to the land by such an adverse possession of it by him. This fact it seems to us eliminates many of the objections made and questions raised by the defendant. One of its contentions being that the adverse possession of J. F. Watkins could not be considered as against his wife, Mrs. Watkins, who was the daughter of Daniel B. Newton. But we do not understand from the record that it ever was so allowed to have effect. It does not even appear that his wife had any title to the land, or that she even claimed any, but all that does appear in that respect tends to show the contrary to be the case.

We may refer to one part of the evidence from which it would appear that the wife did not claim the land, nor did her children, but at J. F. Watkins' death the tract of land on which the timber in controversy stood was divided by order of court among his heirs alone, without any claim or suggestion that Mrs. Watkins was interested at all in it. It appears from the syllabus of the case relied on by the defendant that it was there held as follows: "The possession of lands by the husband under a deed made to him by his wife, void for noncompliance with Rev., 2107, is for the benefit of the wife, and during the continuance of the marriage relation during her life cannot be considered as adverse to her and ripen title in him by sufficient adverse possession. *Semble,* after her death his possession would be adverse possession against her heirs; and *quære* as to whether it would be such before demand is made for possession." *Kornegay v. Price,* 178 N. C., 441. The principle of that case does not apply here, as it does not appear that J. F. Watkins held in opposition to his wife, or adversely to her, or that she had any title, but that he held, in his own right, and adversely to every one. The title having thus vested in J. F. Watkins, he conveyed the land to L. D. Atkins, who, with his wife, conveyed it to M. T. Murray, and the latter, with his wife, to the plaintiff.

It was, of course, competent to show where the land was situated that had been trespassed upon by cutting the trees and what damage had been done to it, not only that which arose from cutting and removing the trees, but how, and to what extent, the remaining land had been injured, or depreciated in value, by the acts of trespass, so that the full amount of the damages could be estimated. It was also competent and pertinent to show where the "high-water mark" and Poley Branch were, as they were alleged to have been called for in the deed. There was something said about tampering with the deed of H. J. Faison and wife to the defendant, those witnesses having testified that they had only conveyed to the defendant the timber to the high-water mark of the millpond, which was the southern boundary of their land, and that the deed then exhibited was not the one they signed and delivered to the defendant, that the sheets were now of different width, one of the four sheets not being like the others; and that the deed was torn, but, as we have said, this evidence proved to be harmless owing to the careful and discriminating manner in which the learned judge charged the jury and restricted their attention solely to the question as to the adverse possession of J. F. Watkins, the cutting of the timber and the damages. If the defendant had mutilated the deed of Faison and wife, or defaced it in any material way, we do not see why it was not competent to show it upon the question of the *defendant's* good faith in claiming the land, and denying the trespass; and as impeaching the validity of the defense, and as showing the true location of the defendant's land to be different from what it was claimed to be. And further, it was admissible to show that the alleged spurious deed differed from the original as signed by Faison and wife, and in what respects it differed, so as to establish the real boundaries of the land as they conveyed it. In this connection the plaintiff contended that notwithstanding the testimony of H. J. Faison and wife that the paper exhibited to the court by the defendant as the deed from them was not the original deed so delivered to the defendant, the defendant failed to offer any evidence explanatory of the appearance of the paper and of the other facts testified by H. J. Faison and wife tending to establish the falsification of the said paper, and that the deed to the defendant's grantor, H. J. Faison, limits his boundaries to the high-water mark, yet the defendant is undertaking in this action to claim title to the timber on the land between the high-water mark and the run of Poley Branch by virtue of a conveyance which its grantors declare bears a substituted page which changes, as the witnesses testify, the true description by erasing the words "high-water mark" and substituting therefor "the run of Poley Branch." This evidence as to the alteration of the deed was not used, so far as we can discover from the record, for any purpose to which it was not relevant, even if it was met with proper objection at the time it was offered.

We will not consider the alleged alteration with reference to its legal effect upon the continued validity of the deed itself, but only so far as it may have influenced the jury in determining the location of the lands in controversy and upon the question whether there had been a trespass by the defendant.

The objections to the testimony of A. T. Griffin were not well taken. He had denied the trespass by the defendant company of which he was the general manager, and testified to the comparative value of the timber and it was competent to cross-examine him as to those matters and with reference to the Faison deed to the defendant, in order to test the value of his testimony, and especially as to the value of the land and timber and the damages (*Gay v. R. R.,* 148 N. C., 336), and to show his *animus,* feeling, or bias. *Bailey v. Winston,* 157 N. C., 252.

Numerous exceptions were taken to testimony consisting of several distinct parts, without indicating more particularly the ground of the objection. This we have held to be too general. *Holmes v. R. R.,* 181 N. C., 497; *Kennedy v. Trust Co.,* 180 N. C., 225.

Upon a review of the case and a due consideration of the exceptions noted by the defendant, we are of the opinion that it was correctly tried.

No error.

WILLIAM M. BELLAMY, ADMINISTRATOR, v. BLADEN COUNTY LUMBER COMPANY.

(Filed 3 May, 1922.)

1. **Employer and Employee—Master and Servant—Safe Place to Work—Youthful Employees—Warnings—Instructions—Supervision.**

   It is required of the employer of labor to exercise ordinary care in providing them a reasonably safe place to work, and especially to warn and instruct those who are youthful and inexperienced concerning the risks and dangers which import menace of serious injury, and to provide adequate supervision when conditions are such as to require it.

2. **Same—Negligence—Evidence—Nonsuit—Trials.**

   The owner of a lumber plant, a corporation, used in connection with its plant a slide to haul up the logs from the water. There was evidence tending to show that where this slide entered the water the water was knee deep, and waist deep where it ended; and beyond was the channel of the river some twenty or thirty feet deep; that the plaintiff's intestate was a boy about 15 years of age, and inexperienced, and while at work under the defendant's superintendent in repairing this slide, the superintendent left the intestate, with other boy employees, in the water to clear out the bottom and old boards at the foot of the slide, directing them to stay there until his return, but without warning or instructing them as to their danger; that the plaintiff could not swim with the clothes or shoes he necessarily was wearing in the performance of his duties, and in the absence of the superintendent was seen to fall forward and was carried out by the rising river, and was drowned. Upon defendant's motion as of nonsuit: *Held*, sufficient as to the actionable negligence of the defendant to take the case to the jury.

APPEAL by plaintiff from *Connor, J.*, at September Term, 1921, of BRUNSWICK.

Civil action to recover damages of defendant for wrongfully and negligently causing the death of Fred Ballard, plaintiff's intestate. At the close of plaintiff's evidence, on motion, there was judgment of nonsuit, and plaintiff excepted and appealed.

Robert W. Davis and John D. Bellamy for plaintiff.
Rountree & Carr for defendant.

HOKE, J. There were facts in evidence on part of plaintiff tending to show that defendant company owned and operated a lumber mill near the Cape Fear River in said county. That the mill carriage was about 30 feet from the river and 20 to 25 feet above the water level, and there was a slide 7 feet in width running from the carriage down into the log pen in the river, and which extended into the pen and under the water a distance of 10 or 12 feet. That the water was about knee-deep where the slide "struck" the river and waist-deep where it ended, and the logs were dragged from the river as needed up this slide on to the mill carriage, etc. That the slide had become broken or torn up, and when the logs were being pulled out of the pen they would catch and stop and it had become necessary or desirable to repair same. That the intestate was a lad of about 15 years of age, in employment of defendant at the time, and had been for about four days, and on 15 August, 1918, he with two or three other youthful employees, were directed by the foreman of the mill, one Douglas, to go with him and repair the slide where it had become torn up or broken under the water. That while so engaged Douglas, the foreman, finding that he would need to saw a piece of timber for the purpose, went with Ben Willis, one of the boys, to the mill for the purpose, instructing the intestate and his comrades to stay there in the water and clear out the bottom and the old boards at the foot of the slide. That the two boys were in the water when Douglas left, and that he gave them no warning of any danger, but told them "to stay in there till he cut the piece at the mill. That the channel of the river was from 30 to 40 feet deep, and was 30 or 40 feet away." That intestate could not swim, and was in the water with his clothes and shoes on, ready to do the work required. That the tide was rising in the river, and the intestate was seen to fall forward and was caught and carried into deep water and was drowned. It is fully recognized in this jurisdiction and elsewhere that an employer of labor in this class of work, in the exercise of ordinary care, must provide for its employees a reasonably safe place to work, and to warn and instruct youthful or inexperienced employees concerning the risks and dangers which import menace of serious injury, and in the exercise of such care, to provide also adequate supervision when conditions are such as to require it. A rule that is especially insistent in case of youthful employees when their lack of experience and training is likely without it to subject them to risk of serious or substantial injury. In *Ensley v. Lumber Co.*, 165 N. C., 687-695, *Associate Justice Walker* quotes with approval on the subject, 1 Shearman & Redfield on Negligence (6 ed.), secs. 219 and 219 a, as follows: "It is the duty of one who employs young persons in his service to take notice of their apparent age and ability, and to use ordinary care to protect them from risks which they cannot properly appreciate, and to which they ought not to be exposed. This is a duty which cannot be delegated; and any failure to perform it leaves the master subject to the same liability, with respect to such risks, as if the child were not a servant. For this purpose, the master must instruct such young servants in their work and warn them against the dangers to which it exposes them, and he must put this warning in such plain language as to be sure that they understand it and appreciate the danger. . . . The principles governing the employment of minors are to a large degree also applicable to the employment of inexperienced, ignorant, feeble, or incompetent servants. A master having notice of any such defect in a servant, no matter what his age may be, is bound to use ordinary care to instruct the inexperienced or ignorant, and to avoid putting the feeble to work too heavy for their strength, and generally to refrain from exposing them to risks which they are not fit to encounter. When the master has notice of such ignorance or inexperience on the part of the servant as would make the ordinary risks of the business especially perilous to that servant, he must give the servant explicit warning of the danger, and not allow him to undertake the work without a full explanation of its perils." This being the rule of obligation, and applying the principle uniformly prevailing with us that on a judgment of nonsuit, the facts which make in favor of plaintiff's claim should be accepted as true, and construed in the light most favorable to him. We are of opinion that the evidence of record affords a permissible inference that there has been in this instance a negligent breach of duty on the part of defendant, constituting an actionable wrong, and that on the facts as now presented the judgment of nonsuit is erroneous. This will be certified that the said judgment will be set aside and the case submitted to the jury on appropriate issues.

Reversed.

LONNIE C. MIMMS v. SEABOARD AIR LINE RAILWAY COMPANY ET AL.

(Filed 3 May, 1922.)

Appeal and Error—Docketing—Dismissal—Certiorari—Court's Discretion—Consent.

Where a case on appeal has not been docketed by appellant within the time required by the rule of practice in the Supreme Court regulating it, and a motion has not been duly made for a *certiorari*, it will be dismissed, it being discretionary with the court as to whether the motion for this writ will be allowed, which the consent of the parties cannot affect.

APPEAL by plaintiff from *Ray, J.,* at April Term, 1921, of ANSON.

Civil action to recover damages for an alleged negligent personal injury.

Plaintiff, express messenger on train No. 13, running from Wilmington to Charlotte, was injured in a wreck on the night of 2 May, 1919; said wreck occurring about two miles west of Lilesville, and being cause by a derailment of the train.

From a verdict and judgment in favor of defendants, the plaintif appealed.

James S. Manning, McLendon & Covington, and Douglass & Douglas for plaintiff.

B. Vance Henry and McIntyre, Lawrence & Proctor for defendants.

STACY, J. Seaboard passenger train No. 13, running from Wilmin ton to Charlotte, was wrecked on the night of 2 May, 1919, at a poin approximately two miles west of Lilesville in Anson County. Investi gation made on the night of the wreck showed that the train had bee derailed by means of a "draw-bar" unlawfully placed on the railroa track by some person or persons, at that time unknown to the defend ants. Plaintiff was an express messenger in the employment of th defendant American Railway Express Company, and was in charge o the express car on the wrecked train. He brings suit against the American Railway Express Company, the Seaboard Air Line Railway Company, and the Director General of Railroads, to recover damages for injuries alleged to have been sustained in said wreck. The jury having answered the issues of negligence in favor of the defendants, there was a judgment dismissing the action and taxing the plaintiff with the costs.

We have carefully examined the record and have been unable to find any reason for disturbing the result below. Upon the merits, we think the judgment must be affirmed. No reversible error has been shown.

It also appears that this case was tried in April, 1921. The appeal, therefore, should have been docketed and heard at the last term; or, at least, the record proper should have been seasonably docketed here and motion duly made for a *certiorari.* This latter writ is a discretionary one, and counsel may not dispense with it by agreement. *In re McCade, ante,* 242; *S. v. Johnson, post; S. v. Hooker, post.*

Animadverting upon a similar state of facts, in *S. v. Trull,* 169 N. C., 370, the present *Chief Justice,* speaking for a unanimous Court, said: "We note that this trial was had in June, 1914. Under the statute and rules of the Court this appeal was required to be docketed at the fall term of this Court before the call of the docket of the district to which it belongs, under penalty of dismissal. Rules 5 and 7, 140 N. C., 540, 544; Rev., 591; *Pittman v. Kimberly,* 92 N. C., 562, and numerous cases thereto cited in the Anno. Ed., and *Burrell v. Hughes,* 120 N. C., 277, citing numerous cases, and with numerous annotations in the Anno. Ed. It appears in the record that the solicitor agreed with the prisoner's counsel that the case might be postponed and docketed at this term (Spring Term, 1915). This was an irregularity, and was beyond his authority. The statute must be complied with and the cause docketed at the next term here after the trial below. If in any case there is any reason why this cannot be done, the appellant must docket the record proper and apply for a *certiorari,* which this Court may allow, unless it dismisses the appeal, and may then set the case for trial at a later day at that term or continue it, as it finds proper. It is not permitted for counsel in a civil case, nor to the solicitor in a State case, to assume the functions of this Court and allow a cause to be docketed at a later term than that to which the appeal is required to be brought by the statute and the rules of this Court."

No error.

RALPH MOORE v. CHICAGO BRIDGE AND IRON WORKS.

(Filed 3 May, 1922.)

1. Negligence—Contributory Negligence.

There is no essential difference between negligence and contributory negligence, the former applying to the defendant and the latter to the plaintiff, and in either case is the want of due care in doing other than, or failing to do, what a reasonably prudent man would have done under the same or similar circumstances.

2. Same—Proximate Cause.

The plaintiff's contributory negligence to defeat his recovery in an action to recover damages for a personal injury alleged to have been received through the defendant's negligence, is such negligent act of commission or omission so concurring and coöperating with the negligent act of the defendant as to become the real, efficient, and proximate cause of the injury the plaintiff has sustained, or the cause without which the injury would not have occurred.

3. Negligence—Comparative Negligence—Statutes—Damages.

The doctrine of comparative negligence is only recognized by our courts in instances coming within the meaning of the Federal Employers' Liability Act, and our own statute, C. S., 3467, and then only for the purpose of mitigating the damages or as a partial defense.

4. Same—Contributory Negligence—Instructions—Appeal and Error.

Where the issue of plaintiff's contributory negligence arises in an employee's action against a private corporation, an instruction thereon that if the plaintiff's negligence contributed to his personal injury to the degree that he was "guilty," without preponderating, the defendant is not entitled to have the issue answered in its favor, for it must outweigh "the contentions of the plaintiff that he did not contribute," constitutes reversible error to the defendant's prejudice, being in effect an erroneous charge upon the principle of comparative negligence, inapplicable to the case.

APPEAL by defendant from *Ray, J.*, at the October Term, 1921, of MECKLENBURG.

Civil action to recover damages for an alleged negligent personal injury.

Plaintiff, an employee of the defendant company, was engaged, with other servants, in the work of erecting a steel tower and water tank for the Standard Bonded Warehouse Company in the city of Charlotte. At the time of the injury plaintiff, together with other employees, was undertaking to move a long pole, similar to a telegraph pole, from the platform of the warehouse to the scaffold around the water tank. The pole was being conveyed on a two-wheeled dolly, or small wooden hand truck. When the wheels of the dolly came to the rail at the end of the platform it was necessary, in order to get the wheels over the rail and upon the bridge leading to the tower—an elevation of five or six inches—

to place two short boards or planks in proper position so as to easily push the dolly from the platform up to and upon the bridge. The plaintiff selected the plank for the wheel on his side, placed it himself, and was helping to push the truck or dolly up the boards so placed when the dolly careened or tilted towards him, and he either jumped off or was knocked off the platform and fell a distance of five or six feet to a lower platform, with the result that his leg was broken.

Defendant pleaded assumption of risk, the fellow-servant rule, and contributory negligence, in that the plaintiff, by his own carelessness and negligence in placing the plank, etc., brought about his own injury.

From a verdict and judgment in favor of plaintiff, the defendant appealed, assigning errors.

D. E. Henderson and T. A. Adams for plaintiff.
E. R. Preston and Wade H. Williams for defendant.

STACY, J., after stating the case: There are a number of exceptions appearing on the record, but we deem it unnecessary to consider them *seriatim,* as, in our opinion, a new trial must be awarded for error in the charge on the issue of contributory negligence. Upon this phase of the case his Honor instructed the jury as follows: "So, if you find that the plaintiff in the case, under the contentions which the court will later lay down for you, was guilty of contributory negligence and contributed to the degree that he was guilty, yet it does not predominate, then the defendant is not entitled to have an issue of contributory negligence answered in its favor; it must prevail by an outweighing of the contentions of the plaintiff that he did not contribute."

As we understand this excerpt, to which the defendant has excepted, it embodies and carries with it a statement of the principle of comparing the negligence of the plaintiff with that of the defendant. This doctrine is applicable with us, and then only for the purpose of mitigating the damages or as a partial defense, in cases arising under the Federal Employers' Liability Act and our own statute, C. S., 3467. *Williams v. Mfg. Co.,* 175 N. C., 226. The instant case comes under neither enactment.

Contributory negligence, such as will defeat a recovery in a case like the one at bar, is the negligent act of the plaintiff, which, concurring and coöperating with the negligent act of the defendant, thereby becomes the real, efficient, and proximate cause of the injury, or the cause without which the injury would not have occurred. Negligence is doing other than, or failing to do, what a reasonably prudent man would have done under the same or similar circumstances. In short, it is a want of due care; and there is really no distinction or essential difference between negligence in the plaintiff and negligence in the defendant, except the plaintiff's negligence is called contributory negligence. The same rule of due care, which the defendant is bound to observe, applies equally to the plaintiff; and due care means commensurate care, under the circumstances, when tested by the standard of reasonable prudence and foresight. The law recognizes that contributory negligence may be due either to acts of omission or to acts of commission. In other words, the lack of diligence, or want of due care, on the part of the plaintiff, may consist in doing the wrong thing at the time and place in question, or it may arise from inaction or from doing nothing when something should have been done. The test is: Did the plaintiff fail to exercise that degree of care which an ordinarily prudent man would have exercised or employed, under the same or similar circumstances, and was his failure to do so the proximate cause of his injury? If this be answered in the affirmative, the plaintiff cannot recover in a case like the one at bar. *O'Dowd v. Newnham* (Ga.), 80 S. E., 40. Of course, it is needless to add that under our statute, C. S., 523, where contributory negligence is relied on as a defense, it must be set up in the answer and the defendant is required to prove it on the trial. That is to say, the defendant must properly plead the negligence of the plaintiff as a defense, and he must also assume the burden of proving his allegation of contributory negligence. *Jackson v. R. R.,* 181 N. C., 153; *Fleming v. R. R.*, 160 N. C., 196. See, also, *Taylor v. Lumber Co.,* 173 N. C., 112, on the question of proximate cause.

His Honor may have had in mind what was said in *Vann v. R. R.,* 182 N. C., 570, but there the Court was speaking of the passive and inactive negligence of the plaintiff, and not such as would make him "guilty of contributory negligence," to use the language employed in the charge here.

As the other exceptions, in all probability, will not arise on another trial, we shall not consider them now.

New trial.

ADAMS, J., concurs in the result.

ED. SHELL AND L. S. RHYNE v. JANE LINEBERGER.

(Filed 3 May, 1922.)

Actions—Equity—Nonsuit—Statutes—Executors and Administrators.

Where there is evidence in support of defendant's counterclaim that she had rendered services to her mother, in the latter's lifetime, under an express promise to pay for them, and that her mother had died without property, except her home place, which continued to remain in the defendant's possession after her death; and that the plaintiff was the grantee of her brother, who had obtained the *locus in quo* by a fraudulent deed from his mother of which the defendant had full knowledge, or actual or constructive notice thereof: *Held*, the fact that more than one year had elapsed before the beginning of the present action, from the termination by nonsuit of the defendant's action to recover for such services from the administrator of her mother, does not bar her recovery upon her counterclaim, the same being of an equitable nature to which our statute, C. S., 415 (Rev., 370), has no application, under the facts of this case, the defendant having, all the time, had continuous possession of the land. *Mast v. Tiller* cited and approved.

APPEAL by defendant from *Ray, J.*, at December Term, 1921, of GASTON.

No counsel for plaintiff.
Mangum & Denny for defendant.

WALKER, J. This action was brought to recover a tract of land consisting of one acre and eight poles, situated about one mile from the town of Dallas, on the Dallas and Spencer Mountain road, the defendant being in the possession of the same. She alleged in her defense that the land was at one time owned by her mother, Mrs. Sarah Lineberger, who died in the year 1907, and that a short time prior to her death the defendant rendered services to her mother from 15 February, 1903, to 10 April, 1907, for which the latter promised to pay the reasonable value thereof, which amounted to $400. After her mother's death, the defendant brought an action against her administrator, and at his death continued the same against her administrator *de bonis non* to recover the amount of her claim, and for the purpose of having the land sold to pay it, and the said action pended in the Superior Court of Gaston County for a long time and until a nonsuit was entered therein in the year 1916.

In this action defendant pleaded as a counterclaim or defense the said indebtedness due from her mother to herself, and alleged in that connection that her brother, Jonah Lineberger, had fraudulently and by undue influence procured from their mother, Sarah Lineberger, a deed for the premises in question, and had afterwards conveyed them to the plaintiffs, who had at the time full notice, actual and constructive, of the defendant's claim and equity against the land; that her brother paid nothing for the land, the deed to him being entirely voluntary, and that Sarah Lineberger retained no property with which to pay her then existing debts, she being utterly insolvent, having no estate whatever except the land conveyed by her to Jonah Lineberger. Defendant prayed for judgment for the amount of her claim against her mother, and that the land be subjected to its payment, and upon the allegations in her answer, the defendant tendered issues which the court refused to submit to the jury, but, on the contrary, submitted the issues tendered by the plaintiffs which, with the answers thereto, were as follows:

"1. Are the plaintiffs the owners of and entitled to the possession of the lands described in the complaint? Answer: 'Yes.'

"2. Is the defendant in the unlawful possession of the lands described in the complaint? Answer: 'Yes.'

"3. What damages are the plaintiffs entitled to recover of the defendant for the wrongful detention of the lands described in the complaint? Answer: 'Three years and eight months, $366.67.'"

The administrator *de bonis non* of Mrs. Sarah Lineberger filed an answer as follows:

"Wiley L. Serves, administrator *d. b. n.*, says:

"1. That he has been appointed administrator *de bonis non* of the estate of Sarah Lineberger by the Superior Court of Gaston County.

"2. That he is not advised of the facts or the legal conclusions therefrom that are involved in the above entitled action, but that the same affect the estate of his decedent.

"3. That having no knowledge or sufficient information of the claim or the grounds therefor, as set forth in the answer of the defendant Jane Lineberger, he denies the same.

"Wherefore, he prays that he be allowed to come into said cause as a party, that the court advise him of his duties with regard to the case at bar, and instruct him upon any judgment that may be rendered therein."

(Duly verified.)

There was no plea of the statute of limitations by the administrator *de bonis non*. The plaintiffs, in their reply to the answer, attempted to plead the statute of limitations to the defendant's claim against the estate of Mrs. Sarah Lineberger, but did not succeed in doing so, as their plea is not in due and proper form for that purpose, though this may be remedied by amendment if permitted by the court. Plaintiffs did plead adverse possession by themselves for seven years under color of title for more than seven years since the death of Mrs. Sarah Lineberger.

The defendant alleged in her answer that the plaintiffs were fully aware of her right and equity, as a creditor of her mother, when they allege that they purchased the land from Jonah Lineberger.

Defendant further alleged in her answer that she has been in the actual adverse possession of the land ever since her mother's death in 1907, and this was actually known to the plaintiffs when they are alleged to have bought the same from Jonah Lineberger, and she avers that the fact of her possession was notice to them of her claim and equity, as against the land, to have it sold and the proceeds of the sale applied to the payment of the debt she holds against her mother's estate.

There is an allegation by the plaintiffs in their reply that this suit was not commenced within one year after nonsuit in the other case. Apart from the fact that the two suits are not between the same parties, the first action having been between Jane Lineberger, as plaintiff, and R. L. Martin, as administrator of Sarah Lineberger, and Jonah Lineberger, as defendants, and this suit being between the plaintiffs and the defendant herein named, we said in *Grimes v. Andrews,* 170 N. C., 515, at p. 522: "Nor do we think that the plaintiff can gain anything by reason of the fact that the suit was not revived within one year after the dismissal. That is required to be done only under Rev., 370, where the statute of limitations would otherwise bar by the lapse of the period prescribed for bringing the suit. It was held in *Keener v. Goodson,* 89 N. C., 273, that section 370 was intended to enlarge the period of limitation and not to abridge it. But the conclusive answer to this contention is that the defendant was in possession of the land at the time from the day of the sale, and the statute did not run against her for that reason, so that the failure to bring her action within the supposed year of grace is not material. That her possession, and that of her father, suspended the operation of the statute has been well settled. *Mask v. Tiller,* 89 N. C., 423. The provision as to bringing a new action within one year after a nonsuit or dismissal, reversal, or other termination of the first suit, as prescribed in the statute, refers only to those cases where the statute of limitations is applicable, and would bar but for this clause, which, if complied with, saves the cause of action. Clark's Code (3 ed.), sec. 142, and note. If the possession of the *feme* defendant, since the sale, prevents the bar of the statute, she did not need the additional time of one year within which to sue. The one-year clause applies only where the statute is operative and would defeat the new action if it were not commenced with the extended period, as above shown." It was held in *Mask v. Tiller, supra:* "The enforcement of an equity will never be denied on the ground of lapse of time, where the party seeking it has been in continuous possession of the estate to which the equity is an incident." And in *Stith v. McKee,* 87 N. C., 389, the Court said that one may preclude himself by his laches from asserting a right which otherwise a court would help him to enforce, there are abundant authorities to show; but to do so, in any case, there must be something on his part which looks like an abandonment of the right, or an acquiescence in its enjoyment by another, inconsistent with his own claim or demand, and accordingly we have searched in vain for a single instance in which the Court had withheld its aid in the enforcement of an equity on the ground of the lapse of time when the party seeking it has himself been in the continued possession of the estate to which that equity was an incident. That case was cited with approval in *Mask v. Tiller, supra,* and the same principle has since been often asserted.

The equity set up by the defendant in her answer is that the deed from Sarah Lineberger to Jonah Lineberger, her son, was procured by his fraud and undue influence, she being in very feeble health for some time before her death and her mind greatly weakened, and that the plaintiffs purchased (if at all) with full actual notice of defendant's equity, and certainly with constructive notice thereof.

The actual and continuous possession of the land by Jane Lineberger after her mother's death was admitted. No final account of the administrator has been filed.

The court instructed the jury that if they found the facts to be as testified by the witnesses they should answer the first and second issue "Yes." Exceptions were duly taken to all the rulings.

It would be vain and idle to pursue the discussion of the case any further, as we are of the opinion that the court erred in refusing to submit appropriate issues as to the equity of the defendant, Jane Lineberger, which she pleaded in her answer, and in charging the jury as it did. It may be that in the further development of the case it may be necessary to submit the issues as to the plaintiffs' title and ownership of the land in connection with the other issues, as their right to recover will depend upon whether or not the defendant Jane Lineberger will succeed in establishing her equity.

The error in the particular indicated by us requires that there be another trial of the case.

New trial.

W. M. BASS v. SOUTHERN RAILWAY COMPANY ET AL.

(Filed 3 May, 1922.)

1. **Common Carriers—Carriers—Railroads—Master and Servant—Employer and Employee — Negligence — Commerce—Statutes—Federal Employers' Liability Act.**

   Evidence that the plaintiff, an experienced brakeman of a railroad company engaged in interstate commerce, was thrown between a box car and a flat car, while, in the course of his employment, he was crossing from the one to the other with the train in motion, by a sudden and unexpected jerking of the train, of such force as to break his hold upon the box car and jerk the flat car from under his feet; and that the cars had been picked up at a station they had left without inspection of the cars or drawheads is sufficient for the determination of the jury upon the issue of actionable negligence, in an action against the carrier to recover damages under the Federal Employers' Liability Act.

2. Same—Assumption of Risk.

The doctrine of assumption of risk, though not wholly abolished by the Federal Employers' Liability Act, has no application where the negligence of a fellow-servant, which the injured party could not have foreseen or expected, is the sole, direct, and immediate cause of the injury, the risks assumed by the employee being only those incidental to the proper and careful operation of the railroad.

3. Instructions—Negligence—Carriers—Railroads—Personal Injury.

The instructions as to the measure of damages to be awarded to an employee who received a personal injury caused by the negligence of his employer, a railroad company, are, in this case: *Held* correct under the ruling approved in *R. R. v. Tilghman*, 237 U. S., 499; *R. R. v. Earnest*, 229 U. S., 114.

APPEAL by both parties from *Finley, J.,* at February Term, 1922, of MECKLENBURG.

This action was brought under the Federal Employers' Liability Act, the plaintiff having been injured while working as a brakeman for the defendant in interstate commerce. Verdict and judgment for plaintiff. Appeal by both parties.

John C. Wallace and John M. Robinson for plaintiff.
F. M. Shannonhouse and W. L. Beam for defendant.

CLARK, C. J. The plaintiff, a brakeman of 14 years experience, in the line of his duty was proceeding from the cab of a freight train towards the engine while the train was in motion. While stepping from a box car to a flat car there was, according to his evidence, such a violent, sudden, and unusual jerk in the train that "it jerked the flat car from under my foot and it jerked so hard it jerked me loose from the car. It jerked my hold loose and I slipped and went through." The plaintiff's arm was cut off and he sustained other serious injuries.

The train consisted of an engine and 14 cars. These cars had been picked up and put in the train at Statesville without any inspection being made either of the cars or the drawheads. This appears from the defendant's own witness.

The defendant assigned as error that the court refused to nonsuit the plaintiff. This was rested upon the proposition that under the Federal Employers' Liability Act the plaintiff assumed the risk. It is not necessary to cite the numerous cases illuminating the law applicable, for it has been very clearly enunciated in *Reed v. Director General,* in an opinion filed 27 February, 1922 (Supreme Court Reporter, April, 1922, p. 264), which holds that "The doctrine of the assumption of risk, though not wholly abolished by the Federal Employers' Liability Act, has no application where the negligence of a fellow-servant, which the injured party could not have foreseen or expected, is the sole, direct, and immediate cause of the injury." In that case *Mr. Justice McReynolds* says: "*Seaboard R. R. Co. v. Horton,* 233 U. S., 492, often followed, ruled that the Federal Employers' Liability Act did not wholly abolish the defense of assumption of risk as recognized and applied at common law; but the opinion distinctly stated that the first section 'has the effect of abolishing in this class of cases the common-law rule that exempted the employer from responsibility for the negligence of fellow-employee of the plaintiff.' And *Mondou v. R. R.*, 223 U. S., 49, declared that 'The rule that the negligence of one employee, resulting in injury to another, was not to be attributed to their common employer, is displaced by a rule imposing upon the employer responsibility for such an injury, as was done at common law when the injured person was not an employee'; and added that in *R. R. v. Ward*, 252 U. S., 18, the Court had said: 'The Federal Employers' Liability Act places the coemployee's negligence, when it is the ground of the action, in the same relation as that of the employer upon the matter of assumption of risk,'" citing *R. R. v. Carr*, 238 U. S., 260; *R. R. v. DeAtley*, 241 U. S., 313.

Justice McReynolds further said: "In actions under the Federal act, the doctrine of assumption of risk certainly has no application when the negligence of a fellow-servant, which the injured party could not have foreseen or expected, is the sole, direct, and immediate cause of the injury. To hold otherwise would conflict with the declaration of Congress that every common carrier by railroad, while engaged in interstate commerce, shall be liable to the personal representative of any employee killed while employed therein, when death results from the negligence of any of the officers, agents, or employees of such carriers."

To the same purport are numerous decisions in this Court. Among them, *Jones v. R. R.*, 176 N. C., 260; *Weldon v. R. R.*, 177 N. C., 179; and *Lamb v. R. R.*, 179 N. C., 619. All these cases were tried under the Federal statute. Upon the evidence in this case, tending to show that there was a violent and unusual jerk of the train not foreseen by the plaintiff, which caused the injury, we think the case was properly submitted to the jury.

The doctrine of assumption of risk under the Federal Employers' Liability Act is that the employee assumes only the risk incident to the proper and careful operation of the railroad. It does not exempt the employer from liability for injuries or death whether caused by the negligence of the corporation or by the negligence of a fellow-servant. The defendant contended that the employer is liable only for injuries caused by the negligence of the company itself as by failure to furnish safety appliances and otherwise; and also that the question of assumption of risk was a question for the court upon the plaintiff's evidence and moved for a nonsuit, which was properly denied.

The plaintiff excepted that the court did not charge the jury correctly as to the measure of damages, but we think that the charge in this respect was correct under the ruling approved in *R. R. v. Tilghman,* 237 U. S., 499, and *R. R. v. Earnest,* 229 U. S., 114.

No error.

BUILDERS SUPPLY AND EQUIPMENT CORPORATION, INC., v. W. C. GADD AND J. T. PIGG.

(Filed 3 May, 1922.)

1. Contracts — Breach — Damages — Speculative Damages—Vendor and Purchaser.

A party breaching his contract may be liable in damages to the other party not only for loss sustained, but for gains prevented, when not purely speculative or conjectural or measured by an indefinite or fanciful conception as to what they would have been had the breach not occurred, but are the necessary and proximate result of the breach, and can be shown with reasonable certainty. The English rule of *Hadley v. Baxendale,* 9 Exch., 341; 156 Eng. Rep., 155, given, approved, and applied.

2. Same—Evidence—Nonsuit—New Trial.

In an action to recover a balance of the purchase price of certain implements used in excavations, there was evidence, in support of defendant's counterclaim, that the plaintiff had failed to send with these implements certain parts essential for their working capacity; that the plaintiff knew their proposed use by the defendant and the time when and circumstances under which they were to be used, and in consequence of the missing parts it was necessary for, and the defendant was compelled to use extra horses and drivers, which caused the defendant to be put to an expense in a certain amount he would not otherwise have incurred: *Held,* sufficient upon plaintiff's motion as of nonsuit to take the case to the jury, and the granting of this motion was reversible error entitling the defendant to a new trial upon his counterclaim.

3. Same—Negligence—Waiver—Questions for Jury.

Where there is evidence that the plaintiff has breached his contract in failing to deliver essential parts to excavating implements to the purchaser's loss, and there is evidence that the defendant knowingly accepted the imperfect implements at plaintiff's urgent request and promise to furnish the missing parts in time, and when others could not have been bought on the market: *Held,* the questions as to whether the defendant was negligent in his efforts to minimize his loss; or whether his acceptance of the implements after the alleged breach of contract amounted to a waiver, were for the jury, and not those of law which arise upon undisputed facts.

APPEAL by defendant from *Shaw, J.,* at October Term, 1921, of MECKLENBURG.

Plaintiff sued to recover $447.50 as balance due for purchase of ten wheel scrapers and other implements. Defendant Gadd, successor of Gadd & Pigg, pleaded payments with which he said he had not been credited, and alleged that the plaintiff had made an entire contract and sold the defendant certain equipment required in contracts for excavating and grading, that the plaintiff knew the purpose for which the implements were to be used, and failed to deliver certain essential parts of said equipment, in consequence of which the defendant suffered financial loss. He pleaded a counterclaim for the loss so incurred. At the close of the defendant's evidence his Honor granted a motion to dismiss as to the counterclaim. The defendant excepted. The issue was answered by the jury, and judgment was given for the plaintiff. Defendant appealed.

Frank H. Kennedy for plaintiff.
J. C. Newell and William L. Marshall for defendant.

ADAMS, J. The opinion of *Alderson, J.,* in *Hadley v. Baxendale,* (9 Eng. Exc., 341), has been generally accepted as an accurate statement of the rule applicable to the measurement of damages for breach of contract.

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract." 9 Exch., 341; 156 Eng. Rep., 151.

This case approves two rules: (1) If the particular contract cannot be distinguished from the great mass of similar contracts only such damages may be recovered as would naturally and generally result from the breach; (2) but if there are special circumstances communicated to or known by the other party at the time the contract is made, special as well as general damages may be recovered. 8 R. C. L., sec. 25 *et seq.*

Accordingly, where a person violates his contract he may be liable in given circumstances not only for losses sustained, but for gains prevented. Profits are not considered as an element of damages if purely speculative or conjectural, or measured by an indefinite or fanciful conception as to what they would have been had there been no breach of the contract. *Boyle v. Reeder,* 23 N. C., 607; *Foard v. R. R.,* 53 N. C., 236; *Roberts v. Cole,* 82 N. C., 293; *Jones v. Call,* 96 N. C., 337; *Lumber Co. v. Iron Works,* 130 N. C., 584; *Machine Co. v. Tobacco Co.,* 141 N. C., 285. But lost profits are a proper element of damages where such loss is the necessary and proximate result of the breach and can be shown with reasonable certainty. *Mace v. Ramsey,* 74 N. C., 11; *Oldham v. Kerchner,* 79 N. C., 106; *Willis v. Branch,* 94 N. C., 143; *Mills v. R. R.,* 119 N. C., 694; *Neal v. Hardware Co.,* 122 N. C., 105.

In *Furniture Co. v. Express Co.,* 148 N. C., 89, *Hoke, J.,* recognizing the uncertainty of estimating the profits of a going enterprise which are dependent on the varying cost of labor and material and the fluctuations of the market value of the product, states also the principle which is often applied in case of the delayed shipment of goods: "Where the goods shipped have a market value, and there is nothing to indicate the specific purpose for which they were ordered, these damages are usually the difference in the market value of the goods at the time fixed for delivery and that when they were in fact delivered. We have so held in the case of *Development Co. v. R. R.,* 147 N. C., 503, and *Lee v. R. R.,* 136 N. C., 533, is to the same effect. When, however, the goods are ordered for a special purpose or for present use in a given way, and these facts are known to the carrier, he is responsible for the damages fairly attributable to the delay and in reference to the purpose or the use indicated. And it is not necessary always that those facts should be mentioned in the negotiations, or in express terms made a part of the contract, but when they are known to the carrier under such circumstances, or they are of such a character that the parties may be fairly supposed to have them in contemplation in making the contract, such special facts become relevant in determining the question of damages." *Lumber Co. v. R. R.,* 151 N. C., 23; *Peanut Co. v. R. R.,* 155 N. C., 149; *Rawls v. R. R.,* 173 N. C., 6.

Applying these principles to the case at bar, we think his Honor should have submitted to the jury the evidence relating to the defendant's counterclaim. There was evidence tending to show that the plaintiff failed to ship several of the articles included in the contract; that it knew the particular purpose for which they were to be used and when the work was to be commenced, and promised to have all the articles ready for the defendant at that time; that shipment was delayed several months, and the wheelers, when delivered, were not equipped with the draft hooks; that plaintiff's officers requested the defendant not to order the delayed articles from another—"Every day they would take it up with me, and they would say, 'Don't order it, we will have them here for you' "—and, in addition, that the wheelers could not be bought on the market at that time. There was evidence tending also to show the loss suffered by the defendant in the use of the drag pans instead of the three delayed wheelers—that if the contract had been performed he would have saved the cost of horses and drivers for three extra drag pans, and would have moved more dirt. Of course, with reference to the motion to nonsuit, it is not necessary to consider evidence in contradiction or rebuttal.

In the circumstances disclosed by the record we cannot hold as an inference of law that the defendant was negligent in his efforts to minimize his loss, or that he waived his right of action by accepting the implements after the alleged breach of the contract. It is true that after the breach a party may waive his right to damages and insist on performance; but the mere acceptance of goods after default does not in all cases amount to a waiver or estoppel. 40 Cyc., 259. Waiver is a matter of law to be determined by the court when the facts are not disputed. *Dula v. Cowles*, 52 N. C., 290. But in this case the questions to which we have referred, considered in connection with the defendant's evidence, were matters for the determination of the jury under the instructions of the court.

The order dismissing the defendant's counterclaim is reversed and a new trial granted. This will be certified.

New trial.

W. B. GAITHER v. E. H. CLEMENT COMPANY.

(Filed 3 May, 1922.)

1. **Employer and Employee—Master and Servant—Tools and Appliances—Duty of Employer.**

While not an insurer, the employer who furnished tools or appliances to his employee with which to do his work, is required to exercise that degree of care in furnishing them which he would exercise in similar circumstances for his personal safety, under the rule of the prudent man.

2. **Same—Simple Tools.**

The rule of the employer's liability when furnishing simple tools to his employee with which to perform his services generally refers to his actual or constructive knowledge of defects therein from which an injury may reasonably be expected to result, and which did result therefrom.

3. **Same—Delegated Duty—Alter Ego.**

The duty devolving upon the employer to exercise due care to furnish his employee a reasonably safe place to work and reasonably safe tools and appliances with which to perform his duties, is not delegable, and another acting for him therein does so as his *alter ego.*

4. **Employer and Employee—Master and Servant—Negligence—Contributory Negligence—Evidence—Questions for Jury—Trials.**

Where there is evidence that the employer has furnished his employee a defective or improper drill with which to do his work, and that while tapping on it with a hammer to dislodge it from a place it had been used, in obedience to instructions from his superior, a substance flew therefrom and injured the employee's eye, for which damages are sought in his action: *Held,* it was for the jury to determine the questions of accident, causal relation, whether the plaintiff had only assumed that the injury was caused by a particle of steel from an imperfect drill, or whether the proximate cause was the plaintiff's negligent use of the hammer, under the circumstances. *Martin v. Mfg. Co.*, cited and distinguished.

5. **Same—Proximate Cause.**

Where there is evidence tending to show that the plaintiff, an employee acting under the instruction of his employer or his *alter ego*, was injured by striking an imperfect drill furnished him to do his work, and in the course of his employment, with a hammer, by a particle flying from the drill into his eye, the question of proximate cause is one for the jury, under conflicting evidence.

6. **Same—Inspection—Instructions.**

In an action to recover damages by the employee for the negligence of his employer to furnish him a safe tool with which to do his work, and the want of care of the plaintiff to inspect it is relied upon as a defense: *Held,* the plaintiff had the right to assume that the defendant had furnished him a proper tool, and a requested instruction offered by the defendant that omits all reference to the plaintiff's exercise of due care under the circumstances, is properly refused.

7. **Instructions—Appeal and Error.**

Where the plaintiff seeks to recover damages for an alleged negligent personal injury on a trial involving contributory negligence and proximate cause, the use of the words "contributory negligence" in defining proximate cause in the judge's charge, will not be held for reversible error, when from the other parts of the charge a jury of intelligent men must have clearly understood the principle upon which they were being instructed.

8. **Employer and Employee—Master and Servant—Negligence—Duty of Employer—Tools and Appliances—Instructions—Ordinary Care—Appeal and Error.**

The duty of the employer to furnish his employee safe tools with which to perform his services, and a safe place to do so, depends upon the exercise by him of ordinary care in providing them, and an instruction that imposes upon the employer an absolute duty to furnish them, without qualification, leaving out the ordinary care required of him in their selection, is reversible error.

APPEAL by defendant from *Webb, J.*, at November Term, 1921, of GUILFORD.

Plaintiff alleged that he was injured by the negligence of the defendant. Defendant denied negligence, and pleaded plaintiff's contributory negligence and assumption of risk. The issues of negligence, contributory negligence, assumption of risk, and damages were answered in favor of the plaintiff. Judgment on the verdict, and appeal by the defendant.

The plaintiff's statement of facts is substantially as follows: "The plaintiff, at the time of his injury, was in the employ of the defendant as a carpenter, having had no experience in concrete work. The defendant was engaged in erecting a brick and concrete building, and had laid the concrete floors in the building, same having been poured in forms made of wood and supported by 2-inch boards held up by timbers 4 x 4. For some reason it became necessary to drill holes through the second floor of the building, and the defendant's superintendent Cooper ordered the plaintiff and a fellow-servant to do so. The concrete of which the floor was composed had been set up three or four days, but the part where the plaintiff was working and in which the holes had to be drilled, had been run two or three weeks before. The wooden forms were still underneath the concrete. In order to drill the holes and do the work required of the plaintiff, the defendant furnished him a drill made of some of the reinforcing iron left over from use in the concrete. The plaintiff was aided in this work by a fellow-workman—one held the drill and the other hit it with a hammer. The drill was 2½ or 3 feet long and about 1½ inches in diameter. One end was flattened out and sharpened, the flat end being wider than the body of the drill. The plaintiff and his fellow-servant, after drilling one or two holes, were undertaking to get the drill out of the hole where it had become stuck. It could not be driven through because the top had become battered and flattened so that it would not pass through the hole; neither could it be pulled back, as the point had become stuck in the wooden form underneath the concrete. The defendant's superintendent, Cooper, gave orders for the plaintiff to go underneath and knock the drill back, while his fellow-servant stayed on top and held it. In obedience to this order the plaintiff went underneath, got a step-ladder, went upon it, and with a hammer weighing about 2½ pounds struck the end of the drill; whereupon, with the first stroke a piece flew off the drill and hit him in the left eye, putting it out. It was not light underneath the floor. His eye had been in good condition up to that time."

Wilson & Frazier and R. C. Strudwick for plaintiff.
J. Lawrence Jones and F. P. Hobgood, Jr., for defendant.

ADAMS, J. The complaint states four phases of the defendant's alleged negligence, but at the trial the plaintiff relied mainly on the asserted negligent failure to provide for him a suitable drill and a safe place in which to work. After the plaintiff's witnesses had testified, the defendant, declining to offer evidence, made a motion to dismiss the action as in case of nonsuit. In support of the motion it now insists (1) that the injury was an accident; (2) that even if the general rule prescribing the employer's duty as to furnishing implements applies where the tools are of simple construction, still, granting the defendant's negligence in the respects complained of, there was no proximate causal relation between such negligence and the plaintiff's injury; and (3) that the plaintiff, disregarding the safe way of driving back the drill, chose the dangerous way by using a hammer for that purpose.

The master is not an insurer of the servant's safety, but he is required to exercise ordinary care to provide reasonably safe instrumentalities wherewith, and reasonably safe places wherein, the servant shall do his work. In the discharge of this duty he meets the requirements of the law if he exercises that degree of care which a man of ordinary prudence would exercise having regard to his own safety, if he were providing such appliances or places for his own personal use. *Marks v. Cotton Mills,* 135 N. C., 290; *Nail v. Brown,* 150 N. C., 535; *Mercer v. R. R.,* 154 N. C., 401. In *Mercer's case, supra, Allen, J.,* said: "This duty applies alike to the simple and the complicated tools, but the authorities agree that after performing this duty, the law does not impose the same obligations with reference to the two classes of tools. When the tools and appliances are complicated, the employer must inspect them from time to time, and must see that they are maintained in a reasonably safe condition." *Fearington v. Tobacco Co.,* 141 N. C., 83. With reference to simple tools, the question of the employer's responsibility may generally be referred to his actual or constructive knowledge of defects from which injury may reasonably be expected to result. This principle has been frequently applied; as, for example, where the employer had provided a hammer that was not suitable for the work entrusted to the employee (*Young v. Fiber Co.,* 159 N. C., 376); where a pin intended to secure a wheel on the spindle of a truck had been materially worn by long use (*Cotton v. R. R.,* 149 N. C., 227); where a ladder used to clean out a vat had become worn and defective (*Reid v. Rees.* 155 N. C., 231); and where a defective chisel had been furnished for cutting slack rivets from an oil tank (*Mercer v. R. R., supra*). That there had been, in some of these cases, an opportunity for inspection is unimportant, for the reason that in the instant case the defendant not only manufactured the drill, but provided material that was not suitable for the purpose. *Rogerson v. Hontz,* 174 N. C., 27; *Thompson v. Oil Co.,* 177 N. C., 279; *Hensley v. Lumber Co.,* 180 N. C., 573. So likewise as to the question whether the servant who made or sharpened the drill was a competent workman. The master's duty with regard to providing reasonably safe and suitable tools is not delegable, and such servant must be regarded as the representative or *alter ego* of the defendant, and not as a fellow-servant of the plaintiff. *Chesson v. Lumber Co.,* 118 N. C., 60; *Bolden v. R. R.,* 123 N. C., 617; *Tanner v. Lumber Co.,* 140 N. C., 479; *Harmon v. Contracting Co.,* 159 N. C., 28; *Mincey v. R. R.,* 161 N. C., 470; *Clements v. Power Co.,* 178 N. C., 55.

The defendant contends, however, that the hurt inflicted could not have been foreseen, that it was an accident, and that there was no causal relation between the alleged negligence and the plaintiff's injury. As we have said, there was evidence tending to show that the defendant negligently furnished a defective drill, and that the plaintiff, in obedience to instructions attempted to "knock it back through the boards or wood, . . . whereupon a piece flew off the drill and hit him in the left eye." The defendant says that the plaintiff only assumed that the particle of steel came from the drill; but the jury found it to be a fact. The defendant says that the proximate cause of the injury was the plaintiff's negligent use of the hammer; but this was a matter for the consideration of the jury. The principle discussed in *Martin v. Mfg. Co.,* 128 N. C., 264, is not applicable where the employer has actual or constructive knowledge that the defect in a simple tool which he provides is of a kind importing menace of substantial injury (*Thompson v. Oil Co., supra*); and where there is evidence of concurring negligence on the part of the plaintiff and of the defendant the question of proximate cause must ordinarily be referred to the jury. True it is that where the danger is obvious and the servant has as good an opportunity as the master of seeing the danger, and can avoid it by the exercise of reasonable care, the servant cannot recover against the master for injuries received in consequence of conditions which constituted the danger. Labatt on Master and Servant, sec. 333; *Mincey v. R. R., supra.* But upon the evidence here we cannot hold as a conclusion of law that the alleged negligence of the plaintiff was the proximate cause of his injury. Isaiah Miles testified that the drills in general and approved use for work in concrete were made of octagon and tool steel; that the drill furnished the plaintiff was made of reënforcing steel, or scrap metal, and was more easily battered than one made from octagon steel—"if you hit it on the end it is going to break somewhere." And Costner said that after he had sharpened the drill its point was scaly and blue. The plaintiff's alleged negligence, the safe and the dangerous way of doing the work, and the cause of the injury were not exclusively questions of law. The evidence necessarily carried to the jury the various contentions of the parties, and his Honor therefore properly declined the defendant's motion to dismiss the action.

In view of what has been said, it is unnecessary to refer to the defendant's request for a peremptory instruction upon the second and third issues beyond saying that each of them embraced elements that were determinable only by the jury; and the defendant's prayer for the further instruction that it was the duty of the plaintiff to inspect the drill omits all reference to the exercise of due care, and, when considered in connection with the plaintiff's right to assume that the defendant had performed its duty, it was properly declined. Nor can we concur in the contention that the defendant was prejudiced by his Honor's observation that "a plaintiff may be guilty of contributory negligence and yet that negligence would not be the proximate cause of the injury." The word "contributory" was inadvertently used by his Honor in defining "proximate cause," and not in his instructions upon the second issue; and to conclude that the jury were misled would be practically equivalent to an abolition of the established rule that instructions to the jury must be considered in their entirety. *Maney v. Greenwood,* 182 N. C., 583; *In re Hinton's Will,* 180 N. C., 206. The necessity of adhering to this rule is apparent when we consider the specific instruction that the plaintiff could not recover if his negligence proximately caused or contributed to his hurt.

The seventh and eighth exceptions are addressed to the following instruction: "Now the law says, gentlemen, that it is the duty of the master, if he employs a servant, to furnish him a reasonably safe place to work, and if he does not, and the plaintiff is injured by the failure, by reason of the master failing to furnish the servant a reasonably safe place to work, or the employee a safe place to work, and if such failure is the proximate cause of his injury, then the law says he can recover if the defendant, the employer, was guilty of negligence. The law also says that it is the duty of the master to furnish the servant with reasonably safe tools and appliances with which to do the work, and, as a general rule, if he does not and he is injured by reason of his failure to furnish him reasonably safe tools and appliances to work with, if he is injured, the law says the party can recover." We think these exceptions should be sustained. In Bailey's Law of Personal Injuries (2 ed.), sec. 162, the character and extent of the master's duty are defined as follows: "The underlying doctrine of the master's duty towards his servant, with respect to the character of the appliances furnished and place of work, as well as other duties that rest upon him, is that of the exercise of ordinary care. His duty does not extend to providing reasonably safe places and appliances, but only to the exercise of reasonable care to provide such, and in determining the liability of the master in the matter of their sufficiency this rule should be the guiding test." In Shearman & Redfield's Negligence the doctrine is stated in this language: "The duty of the master is to use reasonable or ordinary care to secure the safety of the servant while engaged in the service, and to that end to use reasonable or ordinary care to provide and maintain safe places to work and reasonably safe machinery, tools, and appliances." Section 183 a. In *Hicks v. Mfg. Co.,* 138 N. C., 326, it is said: "An employer of labor . . . is required to provide for his employees, in the exercise of proper care, a reasonably safe place to work, and to supply them with machinery, implements, and appliances reasonably safe and suitable for the work in which they are engaged." Again, in *Harmon v. Contracting Co.*, 158 N. C., 28: "It is a primary duty of the master to exercise ordinary care in supplying his servant with reasonably safe tools and implements, and a reasonably safe place in which to perform his work." And in *Smith v. R. R.*, 182 N. C., 296, the principle is reiterated: "The court instructed the jury 'that under the law it was the duty of the defendant to furnish to the plaintiff, while in its employment, a safe place to do his work and reasonably safe implements with which to do the work required of him.' His Honor corrected this charge afterwards by instructing the jury that he should have told them that the defendant was required to furnish only 'a reasonably safe place for the servant to do his work,' but left it otherwise intact. It is not the absolute duty of the master to furnish even a reasonably safe place for the servant to do his work, but the true and correct rule is that he must use ordinary care to provide for him such a place. *Choctaw O. & G. R. C. v. McDade*, 191 U. S., 64; *Garner v. R. R.*, 150 U. S., 359; *Washington & G. R. Co. v. McDade*, 135 U. S., 570; *B. & O. R. R. v. Baugh,* 149 U. S., 368. See, also, *Powell v. Anderson S. & T. P. Co.*, 256 Pa. St., 618, and *Kryner v. Gold Mining Co.*, 184 Fed., 43." To the same effect are the following additional cases: *Pigford v. R. R.*, 160 N. C., 98; *Ammons v. Mfg. Co.*, 165 N. C., 449; *Steele v. Grant*, 166 N. C., 641; *McAtee v. Mfg. Co., ibid.*, 456; *Ainsley v. Lumber Co.*, 165 N. C., 126; *Tate v. Mirror Co., ibid.*, 278; *Rogers v. Mfg. Co.*, 157 N. C., 485; *Bradley v. R. R.*, 144 N. C., 557; *Marks v. Cotton Mills, supra; Ensley v. Lumber Co.*, 165 N. C., 691. Isolated expressions may be found which, if literally construed, would make the master's duty absolute; but evidently in these cases a formal statement of the principle was not deemed necessary. *Alley v. Pipe Co.*, 159 N. C., 330; *Avery v. Lumber Co.,* 146 N. C., 595.

The instructions excepted to are at variance with these authorities. His Honor inadvertently omitted therefrom the essential element of ordinary care and imposed upon the defendant the positive duty of providing a place and implements of a designated character. Therein is error which entitles the defendant to a new trial.

Let this be certified to the end that the matters in controversy may be submitted to another jury.

New trial.

STACY, J., concurs in the result reached by a majority of the Court, that the verdict and judgment rendered herein should not be allowed to stand; and further, is of the opinion that the defendant's motion for judgment as of nonsuit should have been allowed.

The plaintiff was an experienced carpenter. He undertook to drive the drill back by going underneath the floor and striking it on the sharp end with a steel hammer; and this without using a block of wood to soften the impact, or without taking any precaution for his own safety or for the protection and preservation of the tools he was using. Can there be any doubt but what this act of carelessness on his part was the proximate cause of the injury? *Thompson v. Construction Co.,* 160 N. C., 390; *Wright v. R. R.,* 155 N. C., 325.

IN RE WILL OF MRS. EUGENIA HARRISON.

(Filed 10 May, 1922.)

1. Wills—Holograph Wills—Devisavit Vel Non—Animus Testandi.

Upon the issue of *devisavit vel non* it is necessary that the paper-writing offered as a holograph will show that it was the maker's intention that it should be so regarded, from the character of the instrument itself and the circumstances under which it was made, and where the *animus testandi* thus appears as doubtful or ambiguous, the question is one for the jury.

2. Same—Verdict.

Where, upon the trial of *devisavit vel non,* the validity of a paper-writing as a holograph will is in question, a negative finding by the jury to an issue as to whether the deceased "wrote all of said paper-writing propounded with the intent that it should operate as her last will and testament, and was it found, after her death, among her valuable papers and effects?" is in effect a finding either that the paper was not written *animo testandi,* or was not found among the valuable papers and effects of the decedent, or both, either one of which is essential to the validity of the writing as a holograph will.

3. Evidence — Deceased Persons — Statutes— Wills—Holograph Wills—Devisavit Vel Non.

A witness interested in the result of a trial of *devisavit vel non* as to whether the holograph will of the deceased was found among her valuable papers and effects after her death, with evidence that it had been securely wrapped in and fastened to some clothes supposed to have been put aside by her for her shroud, addressed in a sealed envelope to three of the beneficiaries, her daughters, locked in her top bureau drawer where she was in the habit of keeping her purse and other effects, may testify to the fact as being within her own knowledge, that the deceased was not in the habit of keeping this drawer locked all of the time, testimony of this character not being prohibited under our statute as to transactions or communications with a deceased person. C. S., 1795.

HOKE, J., dissenting.

APPEAL by propounders from *Bond, J.,* at September Term, 1921, of WAKE.

Issue of *devisavit vel non* raised by a caveat to the will of Louisa Eugenia Harrison. Alleged want of execution, mental incapacity, and undue influence are the grounds upon which the caveat is based.

The jury returned the following verdict:

"1. Did Louisa Eugenia Harrison write all of paper-writing propounded with intent that it should be operative as her last will and testament, and it was found, after her death, among her valuable papers or effects? Answer: 'No.'

"2. If said Louisa Eugenia Harrison wrote said paper-writing propounded, did she at that time have sufficient mental capacity to make and execute a valid last will and testament? Answer: 'No.'

"3. Was the execution of said paper-writing, if written by said Louisa Eugenia Harrison, procured by undue influence exerted over her, as alleged by caveators? Answer: 'Yes.'

"4. Is said paper-writing the valid last will and testament of said Louisa Harrison? Answer: 'No.'"

The court answered the fourth issue as a legal inference from answers 1, 2, and 3.

From the judgment rendered, propounders appealed.

R. N. Simms, H. E. Norris, W. B. Snow, and J. M. Templeton, Jr., for propounders.

Pou, Bailey & Pou and Willis Smith for caveators.

STACY, J. The paper-writing propounded, and which is called in question by the caveat filed herein, is alleged to have been found, shortly after the death of Mrs. Harrison, securely wrapped in some clothes supposed to have been put aside by the deceased to be used as her shroud. The burial clothes, containing the alleged will, were found in the top bureau drawer in Mrs. Harrison's room. This drawer was locked at the time, and it also contained her purse, or, at least, she was in the habit of keeping her purse and other effects in this drawer. The alleged will was sealed in an envelope and addressed to Alice, Maude, and Clyde, daughters of the deceased. The following is a verbatim copy of the paper-writing propounded:

December 21, 1914.

Alice, Maud and Clyde, my dear children, when I am dead want you to have 50 achers of my land run off and give Grove deed to it if he is living then divided equal between you three children if either of you die without having any children at that wons death I want that wons part to go to Maud children, now my dear children please do just like ive ask you to do when I am dead and gone, dont want eny of you to ware black for me, think it looks better not preten to start it then only part black now do as I say about it dont forget to burn all my old things I want you all to do just like ive told you, dont want eney won to read this while I am living. GENIA HARRISON.

The record contains over a hundred exceptions, and it would be a work of supererogation to consider them in detail or *seriatim.* Indeed, we deem it unnecessary to go beyond the first issue; for, if this be answered correctly and without error, the remaining issues and exceptions relating thereto become immaterial.

The jury have found as a fact that the letter or script, if genuine and in the handwriting of the deceased, was not written *animo testandi,* by which is meant that it was not her purpose or intention that said paper-writing should operate as a testamentary disposition of her property (*In re Johnson,* 181 N. C., 305); or else the jury has determined that the same was not found among the valuable papers and effects of the decedent. C. S., 4144. This is the necessary meaning of the answer to the first issue; and, under the jury's finding, the letter or instrument propounded may not be admitted to probate as a valid holograph will. *Spencer v. Spencer,* 163 N. C., 83.

The *animus testandi* of Mrs. Harrison being doubtful, or, at least, ambiguous, as appears from the face of the instrument, we think his Honor was justified in submitting the question to the jury for determination. "It is essential that it should appear from the character of the instrument and the circumstances under which it was made that the testator intended it should operate as his will, or as a codicil to it." *In re Bennett,* 180 N. C., 5.

Propounders object because Mrs. Rasberry, one of the caveators, was permitted to testify that the bureau drawer in which it is alleged the script was found was not usually kept locked; that Mrs. Harrison was not in the habit of keeping it locked; that there was a key to the drawer, and that sometimes it was locked and at other times it was not. It is urged that this testimony should have been excluded, under C. S., 1795, as violative of the rule against offering evidence of personal transactions or communications between the interested witness and the deceased person; but we do not think the evidence in question falls within the inhibition of the statute. It was competent for the witness to say whether or not the drawer was locked, and to testify as to the habit or custom of keeping it locked. This was a matter within her own knowledge, and did not perforce entail a recitation of any personal transaction or communication with the alleged testator. *Carroll v. Smith,* 163 N. C., 204; *McCall v. Wilson,* 101 N. C., 598. The extent of her observation and the opportunity she may have had to know about the matter, independent of any transaction or communication with the deceased, were inquired into on the cross-examination; and this was proper as affecting her credibility and the weight of her testimony, but not necessarily its competency. *In re Bradford's Will, ante,* 4.

In *Lane v. Rogers,* 113 N. C., 171, it was held that the witness might say she saw the book in the hands of the deceased, at the time and place in question, but not that the deceased handed her the book. See, also, *McEwan v. Brown,* 176 N. C., 249, and *Sawyer v. Grandy,* 113 N. C., 42.

After a careful examination of the record, we have found no reversible error with respect to the trial of the first issue, and it is, therefore, unnecessary for us to consider the remaining exceptions.

No error.

HOKE, J., dissenting.

Y. B. HOWELL AND B. S. HOWELL v. N. M. SHAW ET AL.

(Filed 10 May, 1922.)

1. **Actions—Ejectment—Common Source of Title—Estoppel.**

   The plaintiff in ejectment may establish his title to the lands in dispute by connecting the defendant with a common source and showing a better title in himself, the rule thus applying not being strictly an estoppel, but a rule of justice and convenience adopted by the courts to relieve the plaintiff from the necessity of going behind the common source in order to maintain his action.

2. **Same—Limitation of Actions—Adverse Possession—Evidence—Estates—Nonsuit—Trials.**

   In an action of trespass and damages for the unlawful cutting and removing of timber upon the plaintiff's lands, there was evidence of plaintiff's and defendant's chain of title from a common source, and that one of the deeds under which the defendant claims was only of a life estate, but that through inadvertence or mutual mistake this should have conveyed the fee. The defendant was in possession and claimed title by adverse possession under color of this deed: *Held*, the defendant's motion as of nonsuit under the conflicting evidence was improperly allowed upon the principle that if a life estate were outstanding, his possession, during its continuance, would not be adverse to the plaintiff; and the action should be retained under the provisions of C. S., 889: *Held further*, that while the evidence in this case as to location of the land was meager it is sufficient.

APPEAL by plaintiffs from *McElroy, J.*, at September Term, 1921, of MONTGOMERY.

Plaintiff alleged that they were the owners and entitled to the possession of a tract of land in Ophir Township; that the defendants had trespassed thereon, and had cut and, unless restrained, would continue to cut valuable timber, and that they unlawfully withheld possession from the plaintiffs. An answer and a replication were filed. At the close of the plaintiff's evidence his Honor granted the defendant's motion to dismiss as in case of nonsuit. Judgment; appeal by plaintiffs.

Bob V. Howell and J. A. Spence for plaintiffs.
R. T. Poole for defendants.

ADAMS, J. One of the recognized methods by which the title to real property may be established in ejectment is that of connecting the defendant with the common source and showing a better title in the plaintiff. *Love v. Gates*, 20 N. C., 498; *Whissenhunt v. Jones*, 78 N. C., 361; *Spivey v. Jones*, 82 N. C., 179; *Mobley v. Griffin*, 104 N. C., 115. Failing to show a connected chain of title, the plaintiffs introduced evidence tending to prove that all parties derived their title from E. J. Strider. They offered in evidence the following muniments of title to the land in controversy:

1. A release or quitclaim from the heirs at law of E. J. Strider to Hildebrand Hulin and Y. B. Howell, dated 20 June, 1919, purporting to convey the fee.

2. A release from Hildebrand Hulin to B. S. Howell, dated 30 June, 1919, purporting to convey the fee.

3. A paper-writing which plaintiffs contend is a deed from E. J. Strider and his wife to P. D. Luther, dated 12 February, 1876, and which they contend conveys only a life estate.

4. A deed from Luther and his wife to the defendants, dated 5 August, 1919, purporting to convey the fee.

There was evidence tending to show that the instrument under which Luther claimed had been mutilated, but in their answer the defendants allege that it was the intention of the grantors to convey a fee, and that the words of inheritance were omitted through ignorance, inadvertence, or mutual mistake.

The grounds upon which his Honor based the nonsuit are not stated in the record. But the attorney for the defendants argued here (1) that the plaintiffs failed to locate the land; (2) the evidence for the plaintiffs showed adverse possession, which barred their recovery; and (3) that the written instrument by which Luther acquired his title was not sufficient to connect the defendants with the common source.

The paper-writing last referred to was admitted in evidence without objection, and Luther testified to its execution and subsequent mutilation. These circumstances, considered in connection with the defendants' allegation that they are in possession and claim title under this particular instrument, relieves any perplexity otherwise incident to their legal proposition. The rule which applies to the admission of this evidence is not strictly an estoppel; it is a rule of justice and convenience adopted by the courts to relieve the plaintiff from the necessity of going behind the common source. *Frey v. Ramseur*, 66 N. C., 466; *McCoy v. Lumber Co.*, 149 N. C., 1. This deed apparently conveys only a life estate, and the defendants derived from Luther only such title as he had. If a life estate is outstanding, possession during its continuance would not be adverse to the plaintiffs, because they cannot recover possession against the life tenant. It is true that the evidence as to the location of the land was meager, but the description in the complaint, and in each of the deeds, is practically identical.

While the plaintiffs, as the record now appears, are not entitled to recover the land, they are entitled to have the action retained for the purpose of adjudicating the controversy affecting the alleged unlawful destruction of the timber. C. S., 889.

The paper-writing purporting to be the deed to Luther has not been registered. We suggest that the merits of the controversy may the more readily be determined by incorporating in the complaint by way of amendment an allegation as to the execution and delivery of the Luther deed and as to the estate therein conveyed, if it is not meanwhile registered, with such amendment of the answer as the defendants may desire.

The judgment of nonsuit is set aside and the cause remanded for further proceedings.

Reversed.

BROAD STREET BANK v. THE NATIONAL BANK OF GOLDSBORO.

(Filed 10 May, 1922.)

1. **Banks and Banking—Checks—Indorsement—Fraud—Indebitatus Assumpsit—Statutes.**

Where the maker of a check, whether a bank or other corporation, or an individual, fills out the blank spaces by writing in ink and delivers it to the payee as a complete instrument, there is no question of implied agency of the payee to do anything further regarding the negotiation of the instrument as the agent for the maker, and where the payee has fraudulently raised the amount of the check, endorses to another, and receives the money thereon, the maker is not liable to the endorsee except in an action for the original or true amount of the check, upon equitable principles, and allowed by our negotiable instrument law. C. S., 3160.

2. **Same—Equity—Innocent Persons—Principal and Agent—Trusts.**

The equitable principle that where one of two innocent persons must suffer, the law will cast the loss upon him who has put it in the power of another to do the injury, ordinarily arises in instances of fraud or breaches of trust involved in the contract of agency, where one clothed with the real or apparent authority to act for another in the premises has in excess or breach of the authority given, acted to another's injury; and not to instances wherein the maker of a check has filled in the blank places with ink, has signed the same and delivered it to the payee as a completed instrument, and the payee has raised the check to a larger amount, without the assent of the maker, and has fraudulently obtained cash thereon from another, by endorsement.

3. **Same — Negligence — Sensitized Paper— Erasures—Protectographs—Contracts—Tort.**

Where completed checks issued by a bank upon its regular form of checks has been signed by its proper officer, raised by the payee, and endorsed to and cashed by another bank, which brings action against the maker bank for the full amount of the altered checks, the failure of the maker bank to use sensitized paper to prevent chemical erasures and a protectograph, with perforated figures, to prevent fraudulent alterations, is too remote to afford the basis of an action either in tort or contract, or to be considered the proximate cause of the injury, upon an issue of negligence; and the plaintiff is confined to his action for the true amount for which the checks were originally made. C. S., 3106.

4. **Same.**

The equitable principle upon which the indorsee of a check which has been raised by the payee without the maker's assent, is only permitted to recover from the maker upon an *indebitatus assumpsit*, extends to banking institutions, to individual makers, or general business concerns. C. S., 3106.

CLARK, C. J., dissenting.

APPEAL by plaintiff from *Cranmer, J.*, at August Term, 1921, of WAYNE.

Civil action, tried on demurrer to complaint. It appeared from the complaint that one N. L. Massey, a man of business affairs, living in Richmond, Va., well known there and indebted to some of its banks, the plaintiff among others, on or about 18 June, 1918, was in Goldsboro, N. C., and that "after regular banking hours, when Massey and Norwood were alone in the office of defendant, the latter, at the request of said Massey, issued to him four New York Exchange checks for the sums respectively of $2, $6, $2, and $3, payable to said Massey, and signed by G. A. Norwood as president of defendant bank. That they were written out for said amounts in ink, on the lithograph form and paper ordinarily used by the bank with its customers, all the blanks being filled, same were taken by said Massey, and later the ink was erased by chemicals and fraudulently filled out by him for increased amounts aggregating over $40,000, and negotiated with the plaintiff bank for value, or near it, some of the money procured being credited on plaintiff's indebtedness against Massey, and plaintiff sues to recover the amount paid out by them on account of the alleged negligence of defendant, in that its president, Norwood, in drawing said checks failed to use sensitized paper and protectograph devices for making alterations of said checks more difficult, whereby the payee using protectograph himself was enabled to impose said checks upon plaintiff for the larger amount. That the said allegations of negligence on which plaintiff seeks to establish liability of defendant are more especially set forth in the complaint as follows:

"11. That it is a matter of common and general knowledge, which was known, or should reasonably have been known, by defendant's officers and employees at the time of the issuance of said checks, that there had been discovered and developed certain simple chemical preparations which were easily procurable at retail stationery stores at small cost by the public generally, and were in general use for legitimate purposes, and some of which had been widely advertised in this and other states, by means of which a person of ordinary skill and learning, such as said Massey, could easily remove from an ordinary good grade of white bond or ledger paper, such as said checks were written upon, all traces of writing placed thereon with ordinary pen and ink, such as were used in filling in and signing said checks by said Norwood, defendant's president, leaving no visible sign or trace upon the paper of either the original writing or the removal thereof by the chemicals used in the process of such removal, and without injury to the surface or fiber of the paper; and that by the use of such generally known preparations and processes the figures and words denoting the amounts of said four checks, as and in the form originally issued by defendant, could be easily and readily removed and new words and figures written therein in such a way as to escape detection by a reasonably prudent and careful person in the ordinary course of business, and in the manner in which said checks were altered and raised subsequent to their original issue. That said four checks were actually altered as hereinbefore stated by the aforesaid process.

"12. That several years prior to 1918 the danger of innocent parties being damaged and defrauded by application of the processes described in the foregoing paragraph, became a matter of common and general knowledge and grave concern to all business men, and especially to bankers, and in step with the orderly march of progress wherein science and advance learning are continually devising ways and means to combat the dangers arising from the use in modern times and conditions of archaic and inefficient methods, certain simple protective processes and devices were evolved and adopted, and were, in June, 1918, and had been for some years prior thereto, commonly known and approved and in common and general use by banking institutions and business houses in this and all other states, as plaintiff is informed and believes, by the use of which simple processes and devices checks could be so drawn that they could not, by the use of the processes set forth in paragraph eleven above, or any other process, be altered or raised so as to escape detection by a reasonably careful and prudent person in the ordinary course of business by any person save a very few especially trained and highly expert and experienced chemists and document experts, and especially could not have been so altered or raised by said Massey or any person of ordinary skill and knowledge, such protective processes and devices being as follows:

"(*a*) The drawing of checks upon a specially prepared type of paper, known as 'safety paper,' with specially treated and tinted surface, the properties of which are such that no erasure or alteration of the writing thereon can be made, by either chemical or mechanical processes, without leaving upon the surface and fibre of paper itself certain visible and ineradicable tell-tale traces and evidences of such erasures or alterations, except possibly by a very few especially trained and highly expert and experienced chemists and document experts.

"(*b*) The use of a device or machine of the general kind and type of those known as the 'protectograph' or the "protecto check writer,' or some mechanical device, whereby the letters forming the words denoting the amount of the check are punched, cut or perforated into the paper, as described in paragraphs three and nine above, and which write the check in such form as to render impossible its alteration by a person of ordinary skill and knowledge, such as Massey, and in such a way as to escape detection by an ordinary careful and prudent person in the ordinary course of business, and as to render highly improbable its alteration in such a way even by a chemist or document expert of especial training and long experience. That the use of such devices and machines by banks had, in June, 1918, and for several years prior thereto, become so common and general, and the safety from alteration of checks prepared thereon had, during all said years, become so generally recognized by bankers and business men in this State and country that checks so drawn were at said times, and are now, everywhere accepted and taken without question as having been originally so issued and as being free from alteration, as plaintiff is informed and believes.

"13. That by its known, common, uniform and habitual use of a machine or device of the general type and kind described above in paragraphs three, nine, and twelve, in drawing and issuing checks upon its New York depositories, commonly known as New York Exchange checks, defendant, as plaintiff is informed and believes and alleges, led and persuaded the public and other banks in general, and this plaintiff in particular, to reasonably depend and rely upon the fact, and expect that all such checks drawn and issued by defendant would be drawn and filled in, as to the amount thereof, upon such machine or device, and to reasonably rely upon the apparent genuineness of such checks so drawn and bearing the genuine signature of defendant's duly authorized officer, and with no visible traces or evidence of alterations apparent thereon; that in accepting and negotiating said four checks issued by defendant, plaintiff did reasonably rely, and was led by defendant's said actions to rely, upon their apparent genuineness.

"14. That it is, and was at said times, a matter of common and general knowledge, well known to defendant, its agent and officers, that New York Exchange checks issued by banks in good standing and repute, such as defendant, to the order of known payee, and drawn with the use of the aforesaid safety devices, enjoyed a high degree of negotiability and were accepted and freely negotiated at their face value by banks and business men generally in the ordinary course of business, without particular investigation or question; that defendant well knew, and plaintiff alleges, that such checks drawn without the use of said protective devices and processes, but with ordinary pen and ink, in the manner in which said four checks in question were originally drawn and issued by defendant, and capable of being easily and readily altered and raised by persons of ordinary skill and knowledge, such as said Massey, in such a way as to escape detection, were a grave menace to banks and business men generally, and constituted dangerous instrumentalities capable of vicarious damage and injury; that it was defendant's duty to the general public and this plaintiff in particular, in issuing such checks, and particularly the said four checks, to use all means, devices, and processes generally known and approved, and in common and general use in banking institutions, and especially the means, devices, and processes which defendant habitually used, to the knowledge of plaintiff, to render such checks incapable of being so altered and raised without such alteration, being capable of detection by the exercise of ordinary care; and although defendant knew, or should reasonably have known and foreseen, that plaintiff or some other banking institution was liable to be injured and damaged thereby, it nevertheless carelessly, negligently, and in breach of its legal duty issued said four checks in the manner and form aforesaid, with no protective safeguards whatever against their alteration in the manner and way in which they were subsequently altered.

"15. That defendant and its officers and employees were negligent in that they drew and issued said four checks to N. L. Massey without the use of safety paper and the other protective devices above described, and in that they issued said checks in such form that they could be easily and readily altered and raised by a person of ordinary skill and knowledge, such as said Massey, in such a way as to escape detection, as stated above in detail; that such negligent acts and omissions were the proximate cause of plaintiff's acceptance and purchase of said checks for the amounts as altered and of plaintiff's loss, damage, and injury as hereinbefore and hereinafter alleged, and all of which loss, damage, and injury should reasonably have been foreseen by a reasonably prudent person in the banking business, and especially by defendant as the probable result of its negligent acts and omissions."

Defendant demurred on the ground chiefly "that it appears from the complaint that each of the paper-writings in controversy was a negotiable instrument, and the same was materially altered without the assent of the defendant, and plaintiff is not seeking to enforce payment thereof according to its original tenor."

There was judgment sustaining the demurrer, and plaintiff excepted and appealed.

A. D. Christian and Clarkson, Taliaferro & Clarkson for plaintiff.
Teague & Dees and R. N. Simms for defendant.

HOKE, J. It is the accepted position "that for the purpose of presenting the legal questions involved, a demurrer is construed as admitting relevant facts, well pleaded, and ordinarily relevant inferences of fact, readily deducible therefrom, but the principle does not extend to admitting conclusions or inferences of law," etc. *Board of Health v. Comrs.,* 173 N. C., 250-253, citing *Pritchard v. Comrs.,* 126 N. C., 908-913; *Hopper v. Covington,* 118 U. S., 148-151; *Equitable Assurance v. Brown,* 213 U. S., 25, and other cases.

While there are general averments of negligence and proximate cause imputing liability to the defendant bank, a perusal of the complaint will disclose that in so far as they contain or purport to contain allegations of the pertinent facts, the plaintiff rests and intends to rest his right to recover on the basic proposition that the defendant issued to one N. L. Massey, as payee, four New York checks for small amounts, $2, $6, $2, and $3, payable to one N. L. Massey, without using therefor the sensitized or safety paper, and without using the protectograph, an implement whereby the letters showing the amount of the checks are punctured into the paper and otherwise protected from alteration, and for lack of which the said checks, without the knowledge of plaintiff or defendant, were raised by said Massey, payee, respectively to $9,018.12, $14,084.70, $9,000, and $12,903, and negotiated with or through plaintiff bank, receiving therefor from plaintiff at or near the amount called for in the raised or altered condition, and the suit is instituted to recover the amounts so paid from defendant.

In this connection, and with other averments, the complaint alleges further that these checks for the smaller amount were executed on the ordinary paper of the bank, with lithograph forms. The spaces are filled out by writing in ink, signed by the president of defendant bank, and delivered to the payee as completed instruments. And on these the controlling facts in the transaction, the great weight of well considered authority on the subject is against the liability which plaintiff now seeks to enforce. *National Exchange Bank v. William Lester,* 194 N. Y., 461; *Greenfield Savings Bank v. Stowell,* 123 Mass., 196; *Burrows v. Klunk,* 70 Md., 451; *Holmes v. Trumper,* 22 Mich., 427; *Knoxville Bank v. Clark,* 51 Iowa, 264; *Lanier v. Clark* (Texas Civil Appeals), 133 Southwestern, 1093; *Bank v. Wangerin,* 65 Kansas, 423; *Fordyce v. Kosminski,* 49 Arkansas, 40; *Goodman v. Eastman,* 4 N. H., 455; *Bothell v. Schweitzer,* 84 Nebraska, 271; *Walsh v. Hunt,* 120 Cal., 46; *Simmons v. Atkinson & Lampton,* 69 Miss., 862; *Exchange Bank v. Bank of Little Rock,* 58 Federal, 140; *Commercial Bank v. Arden,* 177 Ky., 520; 1st Randolph on Commercial Paper, sec. 187; 1 R. C. L., title Alteration of Instruments, secs. 69 and 70.

In the New York case just cited (*Bank of Albany v. Lester*), it was held: "Where negotiable paper has been executed with the amount blank, it is no defense against a *bona fide* holder for value for the maker to show that his authority has been exceeded in filling such blank, and a greater amount written than was intended. But if the instrument was complete without blanks at the time of its delivery, the fraudulent increase of the amount, by taking advantage of a space left without such intention, will constitute a material alteration. In the latter case, under section 205 of the Negotiable Instrument Law (C. S., 3106), payment thereof may be enforced according to its original tenor. Second, an indorser of a promissory note, the amount of which has been fraudulently raised after indorsement by means of a forgery, is not liable upon the instrument in the hands of a *bona fide* holder for the increased amount, because of negligence in indorsing same when there were spaces thereon which rendered the forgery easy, though the note was complete in form. No liability on the part of the indorser for the amount of such a note as raised can be predicated simply upon the fact that such spaces existed thereon."

That was a case in which it was sought to hold the indorser liable, but *Judge Willard Bartlett,* delivering the opinion, refers with approval to a number of the leading cases in which it was sought to hold the maker liable and in which the proposition was rejected, and in closing the opinion makes comment on the general question of liability as follows: "On what theory is the indorser negligent because he places his name on paper without first seeing to it that these spaces are so occupied by cross lines or otherwise as to render forgery less feasible? It can only be on the theory that he is bound to assume that those to whom he delivers the paper or into whose hands it may come, will be likely to commit a crime if it is comparatively easy to do so. I deny that there is any such presumption in the law. It would be a stigma and a reflection upon the character of the mercantile community, and constitute an intolerable reproach of which they might well complain as without justification in practical experience or the conduct of business. That there are miscreants who will forge commercial paper by raising the amount originally stated in the instrument is too true, and is evidenced by the cases in the law reports to which we have had occasion to refer; but that such misconduct is the rule, or is so general as to justify the presumption that it is to be expected, and that business men must govern themselves accordingly, has never yet been asserted in this state, and I am not willing to sanction any such proposition, either directly or by implication. On the contrary, the presumption is that men will do right rather than wrong. As was said by *Judge Cullen,* in *Critten v. Chemical National Bank* (171 N. Y., 224), it is not the law that the drawer of a check is bound so to prepare it that nobody else can successfully tamper with it. Neither is it the law that the indorser of a promissory note, complete on its face, may be made liable for the consequences of a forgery thereof, simply because there were spaces thereon which rendered the forgery easier than would otherwise have been the case."

In *Savings Bank v. Stowell, supra,* the question as to the liability of one of the makers of a negotiable instrument fraudulently altered without his knowledge and after the delivery in complete form, was examined and dealt with in an elaborate opinion by *Chief Justice Gray,* and the conclusion reached, "That the alteration of a promissory note by one of several makers, not assented to by the others, and by which the amount is increased by inserting words or figures in a blank space left in the printed form on which it is written, avoids the note as to the other makers, even in the hands of a *bona fide* holder for value."

The same position was sustained by the Supreme Court of Michigan in *Holmes v. Trumper,* 22 Mich., 427, and in the able opinion of *Associate Justice Christancy* it is said, among other things: "The negligence, if such it can be called, is of the same kind as might be claimed if any man, in signing a contract, were to place his name far enough below the instrument to permit another line to be written above his name in apparent harmony with the rest of the instrument. . . . Whenever a party in good faith signs a complete promissory note, however awkwardly drawn, he should, we think, be equally protected from its alteration by forgery in whatever mode it may be accomplished; and unless, perhaps, when it has been committed by some one in whom he has authorized others to place confidence as acting for him, he has quite as good a right to rest upon the presumption that it will not be criminally altered, as any person has to take the paper on the presumption that it has not been; and the parties taking such paper must be considered as taking it upon their own risk, so far as the question of forgery is concerned, and as trusting to the character and credit of those from whom they receive it, and of the intermediate holders."

In *Bank v. Wangerin,* 65 Kansas, 423, *supra,* the correct position, in our view, is stated as follows: "Where a negotiable instrument is delivered to a payee, complete in all of its parts, the maker thereof is not liable thereon even to an innocent holder, after same has been fraudulently altered so as to express a larger amount than was written therein at the time of its execution. Second, such maker is not bound at his peril to guard against the commission of forgery by one into whose hands such instrument may come."

And in Randolph on Commercial Paper the author states the position resulting from his examination of the authorities on the subject, as follows: "Where negotiable paper has been executed with the amount blank, it is no defense against a *bona fide* holder for value for the maker to show that his authority has been exceeded in filling such blank, and a greater amount written than was intended. This was also once held to be the rule where no blank had been actually left, but the maker had negligently left a space either before or after the written amount which made it easier for a holder fraudulently to enlarge the sum first written. It has now, however, become the established rule that, if the instrument was complete without blanks at the time of its delivery, the fraudulent increase of the amount by taking advantage of a space left without such intention, although it may be negligently, will constitute a material alteration, and operate to discharge the maker."

In citation to R. C. L., *supra,* the author says, in effect, that the cases holding that negligence on the part of the maker will preclude the defense suggested and set up in the demurrer, was based upon an old English case (*Young v. Grote,* 4 Bing., 253), which had been criticised and distinctly disapproved in principle by subsequent and authoritative English decisions, and that the weight of authority is now in accord with the latter position.

The rule of liability approved by these able and learned courts has been in effect adopted or approved in our Negotiable Instrument Act (C. S., 3106), which provides: "That where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided except as to a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers. But where an instrument has been materially altered, and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment according to the original tenor." It will be noted that the closing paragraph of this section extends to the holder in due course the right to recover the amount received by the maker on the instrument as originally drawn, and enlarging the holder's rights to that extent on the equitable principles which prevail, and sustain the action of *indebitatus assumpsit.* But the former portions of the section are in clear recognition of the principle that a completed instrument fraudulently altered after delivery or materially altered without his assent, will not sustain a recovery against the maker. The significance of this legislation is well brought out in the Kentucky case, above cited, of *Commercial Bank v. Arden,* 177 Ky., 520. In that case the Court held that the maker of a completed negotiable instrument could not be held liable for the raised value of the paper altered after delivery, without his consent or knowledge. And in referring to some of the previous decisions of the Kentucky Court, apparently to the contrary, *Hurt, J.,* delivering the opinion, after an intimation that some of those cases might be distinguished on the ground of an implied authority to make the alteration, said that the question was now controlled by the Negotiable Instrument Act, avoiding a completed instrument by material alteration after delivery.

It is earnestly urged for the appellant that this claim should be upheld in proper application of the equitable principle that where one of two equally innocent persons must suffer, the law will cast the loss upon him who has put it in the power of another to do the injury. But the cases calling for the application of the principle, so far as examined, were instances of fraud or breaches of trust involved in the contract of agency, where one clothed with the real or apparent authority to act for another in the premises has in excess or breach of the authority given acted to another's injury. These were the instances cited, and much relied upon by appellant, from our own Court, *R. R. v. Kitchin,* 91 N. C., 29; *Humphreys v. Finch,* 97 N. C., 303; *Rollins v. Ebbs,* 138 N. C., 140; *Bank v. Dew,* 175 N. C., 79.

In the first three of these cases defendant had clothed another with apparent authority to do the act by which the injury was wrought, and the last, defendant Dew, by gross negligence, had been allowed to procure and hold certificates of stock made out in his name and unpaid for, and by which he was enabled to hypothecate the stock to plaintiff, and in this case there was also strong evidence tending to show that the stock had been actually delivered to defendant, who had procured value from plaintiff by hypothecating the same. Speaking to the principles relied upon in this position of appellant in *Lanier v. Clark, supra, Speers. J.,* delivering the opinion, said: "But we believe that better reasoning and the weight of authority is otherwise. It is not fair to apply the maxim, 'Where one of two innocent parties must suffer loss by the fraud of a third, he who had made the loss possible by his negligence must bear the burden of loss,' or, 'He who trusts most should suffer most,' for in such case it cannot be said that the maker who delivers a perfect and completed note or bill into the hands of another, trusts more than he who purchases the same from that other on his guaranty of its genuineness. Strictly speaking, the doctrine of estoppel ought not to apply except in those cases where the person making the alteration is in some way clothed with agency, as by an apparent authority to make the change. Any material alteration in an instrument evidencing a pecuniary liability is 'forgery,' and it cannot be said that the maker of a negotiable or nonnegotiable note ought to anticipate that any one would commit a forgery, and, therefore, be required to so execute his instrument that such a forgery would be difficult, if not impossible. The law attaches great importance to that quality of commercial paper known as negotiability, and has gone very far in protecting innocent holders of such paper against all manner of defenses when interposed by the maker; but it should never go to the extent of holding such maker liable upon a contract different from what it appeared to be when it left the maker's hand."

It is further insisted for appellant that though recovery may not be had on the instrument, an action lies for the negligence of defendant in issuing the paper without the use of the devices referred to. This suggestion was met and directly disapproved in *Bank of Albany v. Lester, supra,* and this with the other authorities sustaining defendant's position all proceed upon the principle that where the instrument has been delivered in completed form, the possibility that it might be raised or altered by willful fraud or forgery of another is too remote to afford the basis of an action either in tort or contract. In such case the issuing could in no sense be considered the proximate cause of the injury. And in this connection it may be noted also that the fact that a recovery according to the original tenor of the instrument against the maker or prior parties is provided for by the statute on the equitable principles of *indebitatus assumpsit,* in itself shows that this is all the recovery contemplated or permitted by the law.

In some of the authorities cited and relied upon by appellant, there were blank spaces capable of being filled with such ease that the cases might be reconciled and recovery sustained by reason of authority implied from the defective condition of the instrument. But I find none that would sustain a recovery in this case, where, as stated, there is no claim or suggestion of agency, but the parties were dealing at arms length in a business transaction and the checks were drawn on the lithographed paper in ordinary use by the bank and its customers, with every space properly filled by writing in ink and the paper delivered in proper form as a completed instrument.

On these facts, if there were no authoritative decisions or statutory regulation in denial of plaintiff's right to recover, the acceptance of its position would be attended with such inconvenience and would introduce such uncertainties in this branch of the Law Merchant that it would be necessary to establish some rule protecting a defendant from liability. These negotiable instruments are among the most important features of our business life. There is no well grounded distinction in principle which imputes liability to a bank in a case of this sort from that which would equally affect an individual. And it would well-nigh withdraw these instruments from ordinary use if any and every one who issued them without these precautionary devices would incur the risk of liability insisted on by plaintiff in this case.

Evidently recognizing this as a drawback of some seriousness, plaintiff seeks to restrict the application of the principle it involves to banks and large business houses, but what would be the size or character of business houses coming under such a rule of liability or how would this matter be determined?

Again, a bank is not supposed to carry a large quantity of these implements on hand, and if their devices go wrong, is their business to be halted till they can have their implements repaired, or until they can procure others? Or if, in the case suggested, they are called on to make a prompt remittance to New York or some large business center, where time is not infrequently of the first importance, can a bank only write its check at the peril of having the check raised by some skillful forger to an amount that means disaster? And what would be the standard of excellence required in the procurement and use of these protective devices?

It is admitted that the kind now in use do not afford complete protection, and it is well known that day by day the agents of these patent devices, enterprising and insistent, offer their wares, claiming that they have the very latest and only efficient protection. Doubtless, a bank should use these things when it has been shown that they lessen the risk of forgery. As a rule they do use them, but that is very far from the position that a failure to use them imports an actionable wrong.

On the record, the Court is of opinion that the essential and pertinent facts alleged in the complaint neither require nor permit an inference of liability, and defendant's demurrer has been properly sustained.

Affirmed.

CLARK, C. J., dissenting: The defendant demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. The court sustained the demurrer and dismissed the action and this presents the only point in this appeal.

It is well settled law that a demurrer on this ground admits every fact that is pleaded in the complaint. It is therefore admitted:

1. That the plaintiff was a Virginia corporation, engaged in a general banking business at Richmond, Va., and that the defendant is a national banking corporation, engaged in national banking business at Goldsboro, N. C.

2. That a short time prior to 23 June, 1918, after regular banking hours and not in the regular course of business, and when G. A. Norwood, president of the defendant, and one N. L. Massey were alone in defendant's banking house, the defendant, acting through its president and as a matter of accommodation, sold and delivered to said Massey a number of New York exchange checks drawn by defendant upon the First National Bank of New York, and signed by Norwood as president, payable to the order of Massey, and for small amounts, ranging from $2 to $9, among the checks being those sued on in this action. The checks were drawn on ordinary bond paper and not upon what is commonly known as "safety paper," the date, name of payee, and the amount in words and figures being all written in the blanks on the checks with ordinary pen and ink either by Norwood or Massey.

3. It is further admitted by the demurrer that at the time of the issuance of the checks and for some years prior thereto the defendant owned a protectograph or mechanical check writer which it had habitually used in drawing all New York Exchange checks issued by it by means of which the letters forming words denoting the amount of such checks were cut or perforated into the paper, destroying its fiber and damaging its surface by means of which the perforations were dyed with some fast or indelible red and black ink, small perforations forming

some fancy design being made immediately preceding first word and immediately following last word; that in issuing the checks on this occasion Norwood negligently failed and omitted to either write the same upon "safety paper" or to use a protectograph or any like machine or device to write in the amount thereof.

4. It is further admitted by the demurrer that at the time of the issuance of the check, and for years prior thereto, it was a matter of common and general knowledge, which was known by defendant's officers, that there had been discovered and developed certain simple chemical preparations which were easily obtainable at retail stationers at small cost by the public generally, and were in general use for legitimate purposes, by means of which a person of ordinary skill and learning, such as Massey, could easily remove from an ordinary good grade of bond paper such as these checks were written upon, all traces of writing placed thereon with ordinary pen and ink, leaving no visible sign or trace upon the paper of either the original writing or of the means used for its removal.

5. It is further admitted by the demurrer that for several years prior to 1918, when these checks were issued, the danger of innocent parties being damaged and defrauded by application of the processes described above became a matter of general and common knowledge and grave concern to all bankers; and in order to combat the danger to innocent parties, certain simple and protective processes were evolved and adopted and were in use in June, 1918, and had been for some years prior, and their use was generally known and in common use by banking institutions and business houses; and by the use of said processes and devices checks could be so drawn that they could not be altered or raised so as to escape detection by a reasonable and prudent person in the ordinary course of business, save by a few especially and highly trained chemists and documental experts.

6. It is further admitted by said demurrer that these checks could not have been raised by Massey, or any person of ordinary skill and knowledge, if such protective devices had been used, as the defendant was in the habit of using, and as were in common and general use among all banking houses, these devices being, to wit: (*a*) The drawing of checks upon a specially prepared and sensitized paper, known as "safety paper," upon which it was impossible to alter or erase writing without leaving tell-tale traces; and (*b*) a mechanical check-writing machine, such as the kind above described and referred to, and such as was then owned and had been commonly used by this defendant.

7. It is further admitted by the demurrer that the checks so sold by the defendant as aforesaid, out of office hours, and without the use of such devices, were four checks, numbered 11,809, 11,827, 11,811, and

11,829, which were originally drawn for the following amounts, respectively, viz.: $2, $6, $2, and $3; and that after obtaining these checks from the defendant, issued in the manner aforesaid without the protection of above devices, which the defendant possessed and commonly used, and out of office hours, Massey, or some one under his direction, removed therefrom the original writing, denoting the amounts thereof, by means of the chemical process above referred to and raised the same to the following amounts respectively: $9,018.12, $14,084.70, $9,000, and $12,903, the new amounts being inserted in said checks in figures in pen and ink following the dollar mark and being punched and written thereon in words and figures with a mechanical check writer or protectograph of the kind described above, and after having been so altered, when they were presented to the plaintiff the checks appeared regular and genuine in all respects, and bore no visible signs and traces of alteration, and the fact that they had been altered could not be detected by the exercise of ordinary care.

8. On or about 23 June, 1918, Massey, who was known to plaintiff's officers, deposited with the plaintiff at Richmond, Va., the check above referred to, bearing the number 11,829, the same having been altered in the manner above described so as to purport to have been originally drawn for the sum of $12,903, and plaintiff immediately forwarded this check to New York for collection through its correspondent there, and same was duly honored by the First National Bank, the drawee, of which fact plaintiff was informed on 24 June, 1918, and thereupon credited Massey's account with the amount thereof, which, with other funds to his credit, gave Massey a balance of $15,000 on plaintiff's books.

9. It is further admitted by the demurrer that on 24 June Massey drew against plaintiff a check to his own order for $9,000 and used said check in paying another check of like amount which he had hitherto drawn upon the Bank of Commerce and Trust of Richmond, Va., to the order of the defendant, and which had been forwarded for collection, and payment of which had been refused by the drawee by reason of insufficient funds to the credit of Massey; and on the same date the Federal Reserve Bank of Richmond presented to plaintiff for certification, and plaintiff duly certified, a check drawn by Massey for $6,000 to the order of G. A. Norwood (defendant's president), and which was indorsed by said Norwood and said defendant, which check was drawn upon plaintiff and had been previously dishonored on account of insufficient funds. Both of said checks so drawn by Massey were honored and paid by plaintiff prior to its discovery that the $12,903 check was a forgery, and the defendant and its president received the $15,000 above mentioned.

10. It is further admitted by the demurrer that the following day, that is, 25 June, Massey presented to plaintiff for negotiation the three

checks, Nos. 11,809, 11,811, and 11,827, which had been altered as aforesaid, and then appeared and purported to have been drawn respectively for the following amounts: $9,018.12, $14,084.70, and $9,000, and bearing absolutely no traces or evidences of having been altered.

11. The demurrer further admits that plaintiff, having reason to believe in the genuineness of said checks, the other check having been honored by the New York drawee of the defendant, gave Massey the following sums therefor: two New York Exchange checks, $14,084.70 and $7,253.45 respectively (which were negotiated and paid prior to the discovery of the fraudulent raising of said three checks); $7,000 being paid to him in currency and the sum of $3,764.67 by way of credit on notes of Massey held by plaintiff.

12. The demurrer further admits that said three checks were by plaintiff forwarded for collection and dishonored there on account of insufficient funds, and on 28 June it was discovered that they had been fraudulently raised and altered.

13. It is further admitted by the demurrer that on account of the foregoing, plaintiff's net loss and damages were $40,118.17, plaintiff having been called upon as an unqualified indorser to refund, and having refunded, the sum advanced by the New York bank on the first check with interest which it was legally bound to do.

14. It is further admitted by the demurrer that New York Exchange checks drawn by a national bank, written upon "safety paper" or by means of a mechanical check writer, have always enjoyed a very high degree of negotiability, and have always been accepted and cashed by all bankers, not by virtue of any dependence upon the solvency and responsibility of the payee, but merely upon identification of the payee, and with dependence upon the solvency of the drawer and the drawee bank.

15. It is further admitted by the demurrer that the plaintiff knew and relied upon this defendant's habitual and customary use of said protectograph and regular check writer in drawing its New York Exchange checks.

16. It is further admitted by the demurrer that the defendant was negligent in issuing the said checks in the form and under the circumstances alleged, and without using either "safety paper" or the mechanical check writer, and particularly in the failure to use the check writer, which the defendant had habitually and customarily used theretofore; and plaintiff avers that by reason of the above negligent conduct and admissions the defendant is estopped to deny its liability to the plaintiff on account of said checks.

The demurrer having admitted all the above facts, clearly and consecutively stated, the only point involved in this appeal is: "Does the complaint set forth facts sufficient to constitute a cause of action?"

The fundamental legal proposition relied upon by the complainant is that the maker of a negotiable instrument owes a duty to future holders of the same, without notice of any defect therein, and purchased for a valuable consideration, to exercise ordinary care to so draw the instrument as to prevent its being materially altered in a manner not to be detected in the exercise of ordinary care.

This action is based upon the allegations, admitted by the demurrer, of gross negligence on the part of the defendant bank, which negligence was the proximate cause of the imposition practiced by the drawee upon the plaintiff. When, as in this case, such negligence, as is alleged in this complaint, is admitted by the demurrer, and is sustained by the court, as was done in this case, upon the ground that the complaint does not state a cause of action, the dismissal of the action denies to the plaintiff in all such cases the elementary justice of having the rights of plaintiff determined in a court as in all similar cases where a complaining party seeks remedy for damages proximately caused by the negligence of the defendant.

This case is in no wise affected by the provisions of C. S., 3106, which provides: "Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided except as against the party who has himself made, authorized, or assented to the alteration and subsequent indorsers. But where an instrument has been materially altered, and is in the hands of a holder in due course not a party to the alteration, he may enforce payment thereof according to the original tenor." And the defendant contends that the sum total that it is indebted to the plaintiff for the $40,118.17, which it has paid out by reason, as the demurrer admits, of the proximate negligence of the defendant, is the sum of $2, $6, $2, and $3, to wit: $13.

But C. S., 3106, has no reference whatever to a case like this in which the alteration in the New York Exchange checks issued by the defendant to Massey deceived the plaintiff by reason of the negligence of the defendant, as is alleged in the complaint and admitted in the demurrer, in not using the ordinary and customary methods by which the defendant admits it had heretofore used in issuing said exchange, whereby said Massey was enabled to practice such deception and to make such alterations without detection by the plaintiff.

The cause of action here alleged is the negligence of the defendant, and that this was the proximate cause of the injury sustained by the plaintiff which took this paper in ordinary course relying upon the observance by the drawee bank of the ordinary precautions which said defendant had heretofore observed, as it is alleged and admitted, both by itself and by all other banks, and the failure to do which was the sole cause of the successful deception practiced upon the plaintiff.

It is not a matter of the negotiable instrument law, but whether the defendant bank was guilty of negligence which was the proximate cause of the injury sustained by the plaintiff.

"It is the duty of the maker of the note to guard not only himself, but the public against frauds and alterations, by refusing to sign negotiable paper made in such form as to admit of fraudulent practices upon them with ease and without ready detection." *Zimmerman v. Rote,* 75 Pa. St., 191.

In *Leach v. Nichols,* 55 Ill., 276, the Court said: "It has been held by this Court that if a man carelessly lets his note go into circulation written in ink and partly in pencil, thus affording both a temptation and an opportunity to fraudulently alter it, and it is so altered, he shall not be permitted to set up such alteration against an innocent holder."

In *Hoffman v. Bank,* 99 Va., 485, it is said: "When a party puts his paper in circulation, he invites the public to receive it of any one having it in possession with apparent title, and he is estopped to urge an actual defect in that which, through his act, ostensibly has none. It is the duty of the maker of a negotiable note to guard not only himself, but the public against frauds and alterations, by refusing to sign negotiable paper made on such a form as to admit fraudulent practices upon them with ease, and without ready detection. The inspection of the paper itself furnishes the only criterion by which a stranger to whom it is offered can test its character, and when the inspection reveals nothing to arouse the suspicions of a prudent man, he will not be permitted to suffer when there has been an actual alteration. Daniel on Negotiable Instruments, sec. 1405."

In *Bank v. MacMillan* (1918), I. A. C. (L. R.), 777, where a check was filled out for a certain amount, and additional words and figures were added to increase the amount, and where the check was a fully completed instrument when it was issued, *Lord Finley* said (p. 811): "If a customer, drawing a check, neglects reasonable precautions against forgery, and if forgery ensues, he is liable to make good the loss to the banker, and the fact that a crime has to intervene to cause the loss does not make it too remote. Indeed, forgery is the very thing against which the customer is bound to take reasonable precaution. Leaving blank spaces in the check is the commonest form in which forgery is facilitated, and to lay down as a matter of law that it is not a breach of duty would be a somewhat startling conclusion." He also says: "No one can be certain of preventing forgery, but it is a very simple thing in drawing a check to take reasonable and ordinary precautions against forgery. If owing to the neglect of such precautions, it is put into the power of any dishonest person to increase the amount by forgery, the customer must bear the loss as between himself and the banker."

There are numerous decisions to the same effect, and in all the courts, and it would be useless duplication to repeat them.

This defendant issued these cashier's checks without using the protectograph and a form of paper used always now-a-days by banks and other large business institutions, as a protection which the defendant knew, or should have known, that all persons would expect to be used as a protection, and the absence of which would furnish occasion to defeat the very negotiability which is the first feature of paper. This is all admitted by the demurrer.

The plaintiff does not contend that this requirement of anticipation or prevention of forgery by alteration, with or without erasure, is required of others than first-class business men or banking institutions dealing largely in such paper, nor even upon them in issuing ordinary notes, checks, and bills, but only when they issue such paper as national bank notes, travelers' checks, or New York Exchange (as in this case), and the measure of care which is asked is simply such care as is commonly used in the doing of these acts by men engaged therein throughout this State and Nation.

Before the volume of exchange reached its present limit, and before the issuance of such paper and its protection by all reasonable devices became essential to security of business, there were decisions of the courts which did not require the use of these devices. But business methods have changed with the increased volume of business, with the multiplication of methods to falsify and forge such papers, and with the ready means of protection now at hand by the use of the protectograph and special paper such as the defendant itself was in the habit of using. The failure to do this on this occasion is alleged to be the proximate cause of the forgery in this case, and that it is directly traceable to this negligence of the defendant. The demurrer should have been overruled and the facts determined on answer filed.

The defendant, if it desires, should have leave to file an answer and raise an issue of fact as to whether there was negligence on the part of the defendant which was the proximate cause, as a matter of fact. The court could not hold as a matter of law on the demurrer that upon the facts alleged in the complaint, and admitted by the demurrer, the defendant was not negligent.

We think the court below erred in sustaining the demurrer, and that the complaint alleged a sufficient cause of action because:

(1) The defendant was in duty bound to exercise ordinary care, by using methods in general use, to so draw its cashier's checks as to prevent their being materially altered with ease in a manner not to be detected by the exercise of ordinary care.

(2) That it was negligence in that the defendant did not use either the "safety paper" or the mechanical check writer, which the demurrer admitted is used ordinarily by all banks, and which the demurrer admits that the defendant had habitually used, and that, relying upon that fact, the plaintiff had been led to, and did reasonably, rely upon the defendant doing so.

(3) Such negligence, upon the allegations in the complaint, which are admitted by the demurrer, was the proximate cause of the plaintiff's injury and loss.

(4) The plaintiff's refund to the drawee bank of the check actually paid was not a waiver or estoppel to prosecute its claim against the defendant since the plaintiff as an unqualified indorser was legally bound to make good such payment by the drawee bank.

(5) The plaintiff was subrogated to the right of the drawee bank against the defendant, and the money having been paid out by the drawee bank upon a mistake of fact could be recovered by the drawee bank against the plaintiff and the defendant is liable to make good the loss to the plaintiff for its negligence in drawing the $12,903 check, irrespective of its liability for its negligence in drawing the other checks, and is liable to repay to the plaintiff the sum of $15,000 received by the defendant under a mistake of facts, for it is estopped by its negligent conduct in inducing a belief on the part of the plaintiff of a state of facts which prevented it ascertaining the lack of genuineness of the $12,903 check.

This Court and all others have sustained the proposition in equity and good morals that whenever one of two innocent parties must suffer for the acts of the third, the one whose conduct has enabled such third person to occasion the loss must sustain it. Or to state it somewhat differently, as more applicable to this case: "Where one of two persons must suffer from the fraud or misconduct of a third person, he who by his negligent conduct made it possible for the loss to occur must bear the loss."

The allegations in the complaint admitted by the demurrer fully charge, if taken to be true, that the proximate cause of the loss sustained by the plaintiff was the negligence of the defendant in failing to take the proper precautions used by all banks and large business houses in this day by the use of properly prepared paper and mechanical check writers to prevent the successful perpetration of the fraudulent alteration of the cashier's checks issued by the defendant bank which precautions the complaint avers, and the demurrer admits, were not only in ordinary use by all banks, but were in regular use by the defendant bank itself. If the failure to do this was the proximate cause of the payment by the plaintiff, or its correspondent bank, of the cashier's checks issued by the defendant, and which had been fraudulently altered and raised by the aforesaid negligence of the defendant bank, then the latter was liable as a matter of law.

The judgment sustaining the demurrer should be overruled, and the defendant should have leave to file an answer raising the issue of fact as to proximate cause to be passed upon by the jury. C. S., 546.

VIRGINIA TRUST COMPANY v. NATIONAL BANK OF GOLDSBORO.

(Filed 10 May, 1922.)

APPEAL by plaintiff from *Cranmer, J.*, at August Term, 1921, of WAYNE.

A. D. Christian and Clarkson, Taliaferro & Clarkson for plaintiff.
R. N. Simms and Teague & Dees for defendant.

HOKE, J. In so far as the essential facts tend to impute liability to defendant, this case presents questions substantially similar to those appearing in *Bank v. Bank, ante*, 463, and for reasons stated in that case we are of opinion that the judgment of the Superior Court sustaining defendant's demurrer should be

Affirmed.

CLARK, C. J., dissenting: Defendant demurred to the complaint on the ground that the complaint did not allege facts sufficient to constitute a cause of action. The sole question before the court, therefore, was the said ground of demurrer, and the court sustained the demurrer upon the ground therein set forth, and rendered judgment in favor of defendant dismissing the action, and to this judgment plaintiff excepted and appealed therefrom to the Supreme Court.

The facts alleged in the complaint, which upon demurrer are to be taken as true, are as follows:

1. Plaintiff is a Virginia corporation, engaged in the general banking business at Richmond, Va., and defendant is a national banking corporation engaged in the national banking business at Goldsboro, N. C.

2. A short time prior to 23 June, 1918, after regular banking hours and not in the regular course of its business, and when G. A. Norwood president of defendant, and one N. L. Massey were alone in defendant's

banking house, defendant, acting through its president and as a matter of accommodation, sold and delivered to Massey a number of New York Exchange checks, drawn by defendant upon First National Bank of New York City and signed by Norwood, as president, payable to the order of Massey and for small amounts ranging from $2 to $9, among the checks being the one hereinafter more specifically referred to. The checks were drawn in the form usually employed by defendant in drawing upon said drawee, being printed or lithographed upon a good bond or ledger paper and not upon what is commonly known as "safety paper," the date, name of payee, and the amount in words and figures being all written in the blanks on the checks with ordinary pen and ink either by Norwood or Massey. At the time of the issuance of the checks and for some years prior thereto defendant owned a protectograph or mechanical check writer, or some such machine or device, which it had commonly and habitually used in drawing all New York Exchange checks issued by it and by means of which the letters forming the words denoting the amount of such checks were cut or perforated into the paper, destroying its fiber and damaging its surface and by means of which the perforations were dyed with some fast or indelible red and black ink, small perforations forming some fancy design being made immediately preceding the first word and immediately following the last word; that in issuing the checks Norwood negligently failed and omitted to either write same upon safety paper or to use a protectograph, or any like machine or device, to write in the amount thereof.

3. At the time of the issuance of the checks, and for some years prior thereto, it was a matter of common and general knowledge, which was known, or should have been known, by defendant's officers, that there had been discovered and developed certain simple chemical preparations, which were easily procurable at retail stationery stores at small cost by the public generally and were in general use for legitimate purposes, by means of which a person of ordinary skill and learning, such as Massey, could easily remove from an ordinary, good grade of bond or ledger paper, such as the checks were written upon, all traces of writing placed thereon with ordinary pen and ink, leaving no visible sign or trace upon the paper of either the original writing or the means used for its removal.

4. For several years prior to 1918 the danger of innocent parties being damaged and defrauded by application of the processes described above became a matter of common and general knowledge and grave concern to all bankers; and, in order to combat the danger of innocent parties being so damaged, certain simple protective processes and devices were evolved and adopted, and were, in June, 1918, and had been for some years prior thereto, commonly known and approved and in common and general use by banking institutions and business houses; and, by the use

of said processes and devices, checks could be so drawn that they could not be altered or raised so as to escape detection by a reasonably careful and prudent person in the ordinary course of business, save by a few especially and highly trained chemists and document experts, and especially could not have been raised by Massey or any person of ordinary skill and knowledge, such protective devices being as follows: (*a*) The drawing of checks upon a specially prepared and sensitized paper, known as "safety paper," upon which it was impossible to alter or erase writing without leaving tell-tale traces; and (*b*) a mechanical check-writing machine, such as the kind described and referred to above, and such as was owned and had been commonly used by defendant.

5. Among the checks so sold to Massey by defendant, as aforesaid, was one bearing number 11,828, which was originally drawn for the following amount, viz.: $2. After securing possession of this check, Massey, or some other person at his direction, removed therefrom the original writing, denoting the amounts thereof, by means of the chemical process above referred to, and raised the same to the following amount, viz.: $15,000, the new amount being inserted in said check and figures in pen and ink following the dollar mark and being punched and written therein in words and figures with a mechanical check writer or protectograph of the kind described above. After having been so altered, and at the time when presented to plaintiff as hereinafter set forth, the check appeared regular and genuine in all respects and bore no visible signs and traces of the alteration, and the fact that it had been altered could not be detected by the exercise of ordinary care.

6. On or about 25 June, 1918, Massey, whose identity was known to plaintiff's officers, indorsed, delivered, and sold to plaintiff at Richmond, Va., the check above referred to bearing No. 11,828, same having been altered in the manner described above so as to appear and purport to have been originally drawn for the sum of $15,000; and plaintiff immediately forwarded said check to New York for collection through its correspondent there, and same was duly honored and paid in the regular course of business by the First National Bank, the drawee, of which fact plaintiff was duly notified.

7. In return for said check, which purported to have been originally drawn for $15,000, as aforesaid, plaintiff on the same day gave Massey two checks for the sums of $9,000 and $6,000 respectively, drawn by plaintiff upon Planters' National Bank of Richmond, Va., to the order of said Massey, both of which checks were on the same date, *i. e.*, 25 June, 1918, presented to and paid by Planters National Bank, the drawee.

8. About 28 June plaintiff was notified by the First National Bank of New York that defendant refused to recognize said check No. 11,828

as its obligation on the ground that it had been originally issued for $2 and later raised to $15,000; and thereafter, upon due demand by the First National Bank, plaintiff refunded to the First National Bank the sums paid out by it upon said check, to wit: $15,000, with interest at six per cent from 26 June, 1918, the date of the payment of the check by the drawee, doing so in recognition of its liability to the First National Bank as an unqualified indorser of said check.

9. On account of the foregoing, plaintiff's loss and damage was $15,000, with interest from 26 June, 1918.

10. New York Exchange checks, drawn by a national bank, written upon safety paper or by means of a mechanical check writer, have always enjoyed a very high degree of negotiability, and have always been accepted and cashed by all bankers, not by virtue of any dependence upon the solvency and responsibility of the payee, but merely upon identification of the payee, and with dependence only upon the solvency of the drawer and the drawee banks.

11. Plaintiff knew and relied upon defendant's habitual and customary use of the protectograph or mechanical check writer in drawing New York Exchange.

12. Defendant was negligent in issuing the said checks in the form and under the circumstances alleged, and in the omission to use either safety paper or the mechanical check writer, and particularly in the failure to use the check writer, which it had habitually and customarily used theretofore; and defendant, by reason of its negligent omission, is estopped to deny its liability to plaintiff on account of said checks.

The only exception in the record is to the judgment sustaining the demurrer and dismissing the action upon the ground that the complaint does not set forth facts sufficient to constitute a cause of action. This case and that of *Bank v. Bank, ante,* 463, involve facts substantially similar, and the decision and the dissenting opinion in that case apply here, and, therefore, need not be repeated.

FRANK FISHER v. JOHN L. ROPER LUMBER COMPANY.

(Filed 10 May, 1922.)

1. Compromise and Settlement—Contracts—Consideration.

The plaintiff was injured while in the course of his employment for the defendant, causing, among other things, the amputation of his arm, and while preparing to bring suit for damages upon the alleged negligence of the defendant, was approached by the defendant's superintendent or foreman in charge and control of its employees, who suggested a compromise upon condition that the defendant would give him employment such as he was then capable of doing, and pay him a living wage for the support of himself and family for life: *Held*, the compromise being an adjustment of a *bona fide* claim, is a sufficient consideration to support the agreement thus made, whether it was well grounded or not.

2. **Same—Employer and Employee—Master and Servant—Principle and Agent—Ratification.**

A contract by way of compromise to give employment at a living wage to an employee, sufficient for himself and his family, whose arm had been amputated as a result of an injury alleged to have been caused by the defendant employer's negligence, is too unusual to come under the ordinary powers of a foreman or of an agent of more general powers, but may become binding by the knowledge or acquiescence of the owner; as where the defendant employer was a manufacturing plant, mostly owned by one person, who was aware of the injury, and that his company paid the expenses incident thereto, and for years kept this crippled employee on the payroll and paid him the same wages that he had received before the injury, these circumstances being sufficient to impute knowledge to the management of the defendant's plant of the contract agreed upon by its boss or foreman.

3. **Limitation of Actions — Contracts — Breach—Master and Servant—Employer and Employee.**

Where an employee, injured while engaged in his duty to his employer, has compromised his claim for damages by going back to work in a crippled condition under an agreement that he should receive a living wage for life sufficient for the support of himself and family, and upon breach of the employer of this agreement, has been forced to seek employment elsewhere, the fact that he has done so, under the circumstances, will not avoid his recovery in his action upon the compromise agreement, and the statute of limitations will begin to run only from the time of the defendant's breach of the contract.

4. **Contracts—Breach—Uncertainty—Intent—Interpretation.**

The courts look with disfavor upon the destruction of contracts on account of uncertainty, and, when possible, will so construe them as to carry into effect the reasonable intent of the parties.

5. **Same—Employment for Life—Living Wages—Evidence—Damages—Employer and Employee.**

A contract of employment for a living wage for life to an injured employee for himself and family, etc., founded upon a sufficient consideration, is not too uncertain for enforcement, the persons, the purpose, and the time of the contract being given, and the amount capable of reasonable ascertainment from the evidence of the capacity of the employee to earn wages, his physical condition, the number of his family, the cost of necessaries for an ordinary livelihood, together with the mortuary tables, etc., the final amount of the damages for the breach being reduced by such as by diligent effort he would be able to earn under his physical disability.

APPEAL by defendant from *Lyon, J.*, at October Term, 1921, of CRAVEN.

Civil action to recover for a breach of contract for support, and there were facts in evidence on the part of plaintiff tending to show that in 1908 plaintiff, a young married man, then strong and vigorous, was in the employment of defendant company in one of its lumber mills, and in the course of his employment received serious and permanent injuries. Two of his ribs being broken and one of his arms, this last of such a character that it had to be amputated, etc., and otherwise facts in evidence permitting the inference of actionable negligence on the part of the company and its agent. That when plaintiff had returned from the hospital some weeks after the occurrence, and was preparing to bring suit for the wrong done him, he was called into an office of the company by Mr. W. G. Roberts, defendant's foreman in charge and control of the employees and their work in the mill, and was told by him that the company always took care of their men injured in that way; that there was no use to see a lawyer, and if plaintiff would not sue the company would employ him in such work as he could do about the mill in his crippled condition, and for the balance of his life, give him a living wage sufficient for support of himself and family. That plaintiff agreed to the proposition, and in pursuance of the agreement continued in the service of the company receiving fair and adequate wages for his work till 1920, when owing to the rise in cost of living the sum paid him would not keep himself decently clothed or his family from want. Thereupon plaintiff interviewed Mr. John Sutton, then superintendent of defendant company, and told him that the wages paid would not support him and his family. That they were in a suffering condition. That witness was working both week days and Sundays, and was unable to keep himself clothed, and that he had no shoes, and that unless the company gave him an increase he would have to seek work elsewhere, reminded him that the company had agreed to give witness a living wage, and had cut what they had been giving. That the company had for a long time continued to pay witness the same after the injury as before he was crippled, but owing to the increased prices this, as stated, was insufficient to keep him and his family from suffering and want. That defendant not giving any increase in wages, witness quit of necessity and sought and obtained employment for a time with the East Carolina Lumber Company, and worked with them for three or four months, was then taken down sick with influenza and before he recovered that company had gone out of business. That plaintiff had always been ready and willing to comply with his agreement, but is now all broken up and out of employment. That at time of agreement plaintiff's family consisted of one infant child, and they now have three children. That Mr. Roberts, who made the agreement with plaintiff, was operating the mill at the time; Mr. Speight came later as superintendent. That Mr.

Roberts was foreman, and witness didn't know whether he was superintendent or not. There were also facts in evidence on part of plaintiff tending to show that Mr. Roper, the principal owner of the plant, and Mr. Speight, the superintendent, were aware of plaintiff's injury at the time it was received, and of his being at the hospital, that his arm was amputated, and of his being taken back into service at the same wages he formerly received. Defendant denied any and all liability by reason of the alleged negligence, and plead the statute of limitations in bar of recovery on that ground. Defendant also denied liability on the alleged contract, claiming that it had never been made, and if it had, Roberts was without power to bind the company by any such agreement, and offered evidence in support of its position both as to the alleged negligence and as to nonliability on the contract. Defendant further insisted that the agreement, if made, was without valid consideration; and further, that same was too indefinite to afford a basis for recovery. On issues submitted, the jury rendered the following verdict:

"1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: 'Yes.'

"2. Did the plaintiff, by his own negligence, contribute to his injury, as alleged in the answer? Answer: 'No.'

"3. Did the plaintiff and defendant contract, as alleged in the complaint? Answer: 'Yes.'

"4. Has plaintiff been at all times ready, able, and willing to perform his contract, as alleged? Answer: 'Yes.'

"5. Did defendant wrongfully break said contract? Answer: 'Yes.'

"6. Did the plaintiff, by his own conduct, waive said contract? Answer: 'No.'

"7. Is the plaintiff's cause of action barred by the statute of limitations? Answer: 'No.'

"8. What damages, if any, is plaintiff entitled to recover: Answer: '$2,500.' "

Judgment on verdict for plaintiff, and defendant excepted and appealed, assigning errors.

D. L. Ward and Ward & Ward for plaintiff.
Moore & Dunn for defendant.

HOKE, J. Under the charge of his Honor the verdict has established that there was a breach of the agreement on part of defendant in forcing him to leave their employment by wrongful refusal to give him a living wage, and judgment having been entered for the damages awarded, the defendant objects to the validity of the trial:

1. That there was no consideration for the alleged contract, the facts showing that plaintiff never had a legal claim against the company. This, too, has been resolved by the jury against the defendant, and while there are several exceptions noted to the proceedings in determination of these issues, we do not consider it necessary to refer to them in detail except to say that there were facts in evidence permitting the inference of liability, and if it were otherwise, the evidence, as accepted by the jury, all tended to show that the contract, if made, was by way of compromise and adjustment of a *bona fide* claim on the part of plaintiff against the company. Such an adjustment will afford a sufficient consideration for the agreement whether the claim was well grounded or not. *Dunbar v. Dunbar,* 180 Mass., 170; *Dickerson v. Dickerson,* 19 Ga. App., 269; 6 R. C. L., 662, title Contracts, sec. 71; 5 R. C. L., 890, title Compromise, sec. 13, see generally on Sufficiency of Consideration; *Brown v. Taylor,* 174 N. C., 423; *Spencer v. Bynum,* 169 N. C., 119; *Institute v. Mebane,* 165 N. C., 644.

In the *Massachusetts case* it was held that a compromise cannot be avoided for want of consideration, where made in settlement of a demand arising under a previous agreement between the parties which had been performed for several years, and which one of them insisted was valid and binding. Digest taken from 94 A. S. R., 623. And the principle is well stated in the *Georgia case* as follows: "It is well settled that the law favors compromises, when made in good faith, whereby disputed claims are settled, and especially is this true when related to family controversies; and a promise, when thus made, in extinguishment of a doubtful claim, furnishes sufficient consideration to support a valid contract. While it is not necessary that the contention which forms the basis of such a compromise shall be meritorious in order to support the promise, yet it is essential in order to furnish a consideration therefor, that the contention be made in good faith and be honestly believed in." A position especially exigent here, where the agreement was entered upon and lived up to by the parties for twelve years, and until plaintiff's claim for the injury is otherwise barred by the statute of limitations.

Defendant insists further that there is no evidence of a valid agreement by any one having authority to bind the company. This contract to take on a crippled employee for life is so out of the usual that authority to make it would assuredly not come under the ordinary powers of a mere foreman or boss, or even of an agent of mere general powers. *Stephens v. Lumber Co.,* 160 N. C., 108. But, in addition to the testimony of plaintiff that Roberts, who purported to act for the company, was "operating the mill at the time" there were facts in evidence tending to show that the company paid for the operation amputating plaintiff's arm, and that the owner of the plant and the general superintendent both personally knew of the injury and the amputation, and that plaintiff was taken back with their employment at the same wages, notwithstanding the loss of his arm, and they knew, or should have known, the condition of his return and the agreement concerning his employment, assuredly they had every opportunity to know, and there were facts sufficient to excite inquiry as to the terms of his further employment. As said in *Powell v. Lumber Co.,* 168 N. C., 632: "The scope of the implied authority of an agent may be extended by acts indicating authority which the principal has approved, or knowingly or, at times, negligently permitted the agent to do in the course of his employment." It appeared that this man, having only one arm, was on the employer's payroll at the price of a full hand for twelve years, and if the management didn't know of the terms of plaintiff's employment their negligence in this respect should be imputed to them for knowledge. Again, it is very earnestly contended by appellant that the contract is too indefinite, and for this reason no recovery can be had thereon. It will be noted that this exception assumes the existence of the contract, and the jury has established it according to plaintiff's version. This being true, there is no uncertainty as to the terms which the parties have selected in which to express their agreement that plaintiff during his life would be given a living wage required for the support of himself and family. The person, the purpose, and the time of the contract are clearly given, and the only objection at all possible would be as to the difficulty in fixing upon the amount to be paid, or the value of the contract to plaintiff in case of breach. It is said by an intelligent writer on the subject that the law does not favor, but leans against, the destruction of contracts on account of uncertainty. Therefore, the courts will, if possible, so construe the contract as to carry into effect the reasonable intent of the parties, if it can be ascertained. 6 R. C. L., 648. And by another, that this intent may be determined at times by reference to extrinsic facts relevant to the inquiry. 1 Page on Contracts (2 ed.), sec. 101. Applying these principles, and by reference to the facts in evidence, the capacity of the plaintiff to earn wages, his physical condition, the number of his family, the cost of necessaries for an ordinary livelihood, together with the mortuary tables, also in evidence, would, with other facts, afford data, in our opinion, to enable a jury to come to a reasonable estimate as to the value of the contract held by plaintiff, reduced, of course, by the amount he would be able to earn by diligent effort, and in this aspect the case was considered by the jury and the damages awarded. Contracts not dissimilar have been upheld with us and other courts of approved authority. *Rhyne v. Rhyne,* 151 N. C., 400; *Lumber Co. v. Lumber Co.,* 165 Ala., 268; *Henderson v. Spratlen,* 44 Col., 278.

As to the statute of limitations, the suit is on the contract, and in this instance the right of action did not accrue to plaintiff till a breach of same, which occurred in 1920. *Pinnix v. Smithdeal,* 182 N. C., 410.

On careful consideration, we find no reversible error, and the judgment on the verdict is affirmed.

No error.

W. L. McQUEEN v. R. J. GRAHAM.

(Filed 10 May, 1922.)

1. Boundaries—Evidence—Streams—Adverse Possession—Limitation of Actions—Trespass—Deeds and Conveyances—Color of Title.

Defendant's trespass upon the lappage of land between the descriptions of the boundaries in the plaintiff's and defendant's deed, claimed by adverse possession by the defendant, was made to depend upon the location of a divisional line called for in the plaintiff's deed as cornering in a log road at or near the east edge of Long Branch, but not calling for the run of the branch, and in the defendant's deed as "beginning at a black jack in Yarborough's corner, and runs with his line to McQueen's line, thence as said line," etc.: *Held*, evidence was competent in defendant's behalf which tended to show that McQueen's line was a straight one running near the branch, and under this evidence it was for the jury to determine the true dividing line upon the question of defendant's color; and that it was not a presumption of law, under this evidence, that the true dividing line ran with the run of the branch.

2. Boundaries—Evidence.

Where the true dividing line between the plaintiff and defendant is in dispute in an action of trespass, it is competent for a witness to testify as a fact within his own knowledge as to whether the line claimed by the defendant is in conformity with the description in the plaintiff's deed cornering the line at or near a certain stream, and running thence with its eastern edge, etc.

3. Same—Lappage—Adverse Possession—Color—Limitation of Actions.

Where the defendant claims the lands in dispute, which in an action of trespass is made to depend upon his adverse possession under color of title of a lappage between the description of a boundary in his own deed, and that of the plaintiff, even though the plaintiff may have shown a superior paper title, he may recover by showing actual and sufficient adverse possession under his own deed as color of title, as against the constructive possession of the plaintiff.

4. Same—Court Surveyor.

It is competent for a surveyor appointed by the court to plat the land in dispute to show the contentions of the parties in an action for trespass involving the question of lappage of the lands, to state that he obtained the location of the beginning corner upon the information given him by an adjoining owner, who was examined as a witness, and, at most, it would be harmless error in this case, as the corner was not found and the evidence could not affect the result.

5. Same.

Where an action of trespass depends upon the lappage of lands claimed by the parties, it is competent for a witness, testifying as a fact from his own knowledge, to state that the defendant's deed covered the *locus in quo*, or as to the true location of defendant's boundary.

6. Boundaries—Deeds and Conveyances—Acreage—Evidence.

Where the question of defendant's trespass depends upon the question of lappage between the lines called for in the plaintiff's and defendant's deeds, evidence that the acreage given in the plaintiff's deed would be greatly increased if the divisional line were located according to his contention, is relevant as a circumstance in the defendant's favor, though ordinarily the acreage is no part of the description, and the latter will control, unless the lines or boundaries are in doubt.

7. Same—Court Surveyor.

It is competent for a surveyor appointed by the court, who has platted the contention of the parties to an action of trespass upon lands, depending upon a lappage, to testify to the actual acreage called for by the description in the plaintiff's deed, when otherwise competent and relevant to the inquiry.

APPEAL by plaintiff from *Kerr, J.*, at the October Term, 1921, of CUMBERLAND.

Averitt & Blackwell and Sinclair, Dye & Clark for plaintiff.
Cook & Cook and Rose & Rose for defendant.

WALKER, J. The plaintiff brought this suit against the defendant, claiming ownership of a tract of land of 100 acres, in Cumberland County, and alleging that the defendant had committed a trespass on the land. The defendant admitted the ownership by the plaintiff of the land adjoining that of the defendant. He denied that he committed any trespass, and alleged that he was the owner of the disputed land under the deed referred to in his answer. There was a survey ordered by the court, and the land was surveyed, when, as is alleged, the plaintiff was present with his deeds, and when the defendant was not present, but sufficient information was obtained by the surveyor to ascertain the location of the disputed land, and it appears from the testimony of the surveyor and from his plat that there was, as argued by defendant, a case of lappage of about 15 acres between the boundaries of the plaintiff's deed and the boundaries of the defendant's deed. It is true that the plaintiff showed a chain of paper title running back for some years, and there was evidence on the part of the plaintiff of possession. The defendant also introduced paper title running back for some years, and he asserts that the evidence of his possession of the fifteen acres lappage was direct and plenary, showing that he had been in actual possession of the disputed territory since the date of his deed, in 1903. He had cut wood and timber on it, had worked the turpentine, and had actually cleared up and cultivated a portion of it.

The plaintiff contended that Long Branch constitutes the defendant's boundary, and the defendant contended that it was the "McQueen line," which is some ten or twelve chains east of the actual run of Long Branch. One issue, as to the ownership and possession of the land, was submitted to a jury, and the verdict was in favor of the defendant. Judgment, and plaintiff appealed.

We will take up the exceptions in the order adopted by the plaintiff in his brief:

Assignment of error No. 6 is treated by counsel first, and it seems to be taken entirely to the contention made by the plaintiff that the defendant's deed covered no land east of Long Branch, for the reason that the first call of the defendant's deed is as follows: "Beginning at a black gum in Yarborough's corner, and runs with his line . . . to McQueen's line, thence as said line." If it had been ascertained definitely by the jury, or had been admitted that "McQueen's line" was in Long Branch, the plaintiff might have reason to complain, but it will be noted:

1. That the deed to the plaintiff does not call for the run of Long Branch, but corners in "a log road at or near the east edge of Long Branch; thence with the east edge of said branch," etc. Under this phraseology it can be reasonably contended that the line did not go to the run of the branch, but only skirted the edge of the swamp, "at or near the east edge of the branch."

2. Defendant contends that if there were no other evidence than the deeds offered by the plaintiff as to the location of his western line, the plaintiff might successfully maintain his position, but there is evidence in the record to show that the "McQueen line," as generally recognized in the community, was a straight line on the edge of the hill and on the east side of Long Branch. E. G. Blake stated that he was present when the land was surveyed, and the survey was made on the east edge of the swamp, and the line was a straight line. And the witness Yarborough testified that the "McQueen line" was a straight line along the east edge of Long Branch, and that there were marks on the line below the point "B" as it appears on the blue-print. The witness, D. S. Jackson, stated that when Mr. Jessup, the county surveyor, ran the original line, he was present, and that the division line called for a straight line. If this testimony was to be believed by the jury, and his Honor properly submitted the question to them, they had the right, under the same, to answer the issue in the defendant's favor.

The authorities cited in plaintiff's brief do not apply to the facts of this case. There was no dispute as to the location of Long Branch, but there was a dispute as to the location of what was known in the community as the "McQueen line," and there was evidence on the part of the defendant to the effect that the McQueens had never had possession of any of the property west of the straight line contended for by the defendant as being the "McQueen line." When the actual location of the McQueen line was in dispute, the court left the fact to be determined by the jury.

The defendant having introduced evidence of a deed covering the fifteen acres lappage, if it did cover it, and an actual adverse possession, under that deed, since 1903, he was entitled to have the matter submitted to the jury under a proper charge from the court, so that they could pass upon the issue as to whether the land belonged to the plaintiff or to him. Even though the plaintiff may have shown a senior paper title, if the defendant could show that he was in the actual adverse possession of the lappage under a deed which covered the land in dispute, and the plaintiff could only show constructive possession, then the jury could answer the issue in the defendant's favor. *Simmons v. Box Co.*, 153 N. C., at p. 261; *Currie v. Gilchrist*, 147 N. C., 648. In this case the Court held as follows: "We may, therefore, take it to be settled by this Court, by a long and unvarying line of decisions, that if the person who claims under the elder title have no actual possession on the lappage, such possession, although of a part only, by him who has the junior title, if adverse and continued for seven years, will confer a valid title for the whole of the interference, the title being out of the State." See, also, *Boomer v. Gibbs*, 114 N. C., 76; *Asbury v. Fair*, 111 N. C., 251; *Howell v. McCracken*, 87 N. C., 399; *Kerr v. Elliott*, 61 N. C., 601. In the same case the Court holds that when there is a claim by a junior grantee of title by adverse possession, under color, of the lappage of certain lands, and his possession is of such character and so continuous and adverse as to indicate that he is claiming the land beyond the boundaries of the plaintiff's deed, upon competent evidence, the question is one for a jury, under proper instructions from the court as to the legal effect of the possession.

We do not see how it can be seriously contended that defendant's deeds do not constitute color of title. There is no contention that the deeds do not cover any land at all, or that they are in any way void for indefiniteness or uncertainty of description. If there was no doubt about the fact that the McQueen line was located as claimed by the plaintiff, it might then be contended with some reason that the deed covered no part of the land at all, but when several witnesses testify positively that they were present when the division line was run, and that this division line is a part of defendant's boundary, the judge did not err in allowing the jury to decide the controversy.

It appears from plaintiff's brief that he mainly relied upon the assignment of error No. 6, and that his other exceptions relate only to the admission of evidence.

Plaintiff contends that it was not proper to allow the surveyor, Smith, to testify as to his efforts to find the beginning corner "A," and what Yarborough, the adjoining landowner told him about it. This evidence does not seem to be material to the real controversy, and if there was any error it was harmless. *Singleton v. Roebuck,* 178 N. C., 203, where the Court said: "It was competent for the witness, when asked about the corner at the point, to state that he knew where the stump was, and, besides, it appears to have been harmless and not prejudicial."

Exceptions were taken to questions asked the witness Yarborough, as to whether certain descriptions included the land in dispute. In *Singleton v. Roebuck, supra,* cited to us, the Court held that it is competent for a witness to state that a deed covers the land in dispute when he is stating facts within his own knowledge.

Other exceptions referred to in the assignments of error relate to the testimony of the witness Blake, as to the location of the line between McQueen and Graham, and he testified of his own knowledge that this line is a straight line. This testimony was clearly competent to show the location of the boundary line between plaintiff and defendant, which was a pertinent inquiry to be settled by the jury. He was not giving an opinion or hearsay, but was testifying to an actual fact, because he was present when the Jackson land on the west of the line was surveyed, and it appears that "the defendant's land is a part of a tract known as the Jackson land."

Certain exceptions relate to the cross-examination of plaintiff's witness Smith, by which it was shown that the boundaries of plaintiff's deed, if run to the edge of Long Branch, would include 156 6/10 acres instead of 100 acres, as appears from the description set out in the complaint. This Court has held in several cases that while ordinarily the number of acres mentioned in a deed constitutes no part of the description, yet, where there is doubt as to the location of the land, or some of the lines, evidence which tends to show the acreage may sometimes be relevant and important. In *Currie v. Gilchrist,* 147 N. C., 656, the Court used this language: "Ordinarily, the number of acres mentioned in a deed constitutes no part of the description, especially when there are specifications and localities given by which the land may be located, but in doubtful cases it may have weight as a circumstance in aid of the description, and in some cases, in the absence of other definite descriptions, may have a controlling effect." See, also, *Whitaker v. Cover,* 140 N. C., 280; *Harrell v. Butler,* 92 N. C., 20; *Baxter v. Wilson,* 95 N. C., 137, and as said in *Lumber Co. v. Hutton,* 152 N. C., at p. 541: "Where the location or boundary is doubtful, quantity becomes important." See, also, *Peebles v. Graham,* 128 N. C., 227; *Brown v. House,* 116 N. C., 866; *Cox v. Cox,* 91 N. C., 256. It was certainly competent for the court surveyor to testify as to the actual acreage according to the plaintiff's contention, when he had made the official map and had actual knowledge of the facts.

The defendant emphasizes the fact, in his brief, that though the plaintiff lost on the issue submitted to the jury, he has now really more land than his deed calls for, but this is immaterial unless it may have some slight bearing on the location of the land in dispute, but we have not considered it in that light.

The crucial question is as to the location of the McQueen line, and as the evidence was not all one way, and there is some doubt upon the question, it presented a case for the jury.

The case of *Rowe v. Lumber Co.,* 133 N. C., at marginal page (Anno. Ed.) 439, may be applicable here and show that the question raised, as to the location of the land, was a proper one for the jury. We there said: "The court seems to have excluded these deeds upon the supposition that this Court had ruled at the former hearing of the case that when Catskin Swamp was called for it meant the edge of the swamp, and that the line should stop there. We do not so understand the former ruling. It is true that *Furches, C. J.,* in *Rowe v. Lumber Co.,* 128 N. C., 301, said that certain authorities cited by him tended to sustain the view 'that a call to a swamp, and along a swamp, only goes to the swamp'; but by reference to other parts of the opinion, especially at page 302, it will be seen that he was referring to a call for an object on the margin of the swamp, and not to a call for the swamp generally, for he says: 'But the calls on the other two tracts on the east side are to points on the margin or banks of the swamp, and thence with the swamp.' We cannot think that the learned *Chief Justice* intended to repudiate the principle laid down in *Brooks v. Britt,* 15 N. C., 481, that where there is a call for a swamp it is for the jury to say whether the margin or the run is intended, for he cited that case as one of the authorities in support of what he had said at page 304. The last expression of the opinion must be qualified and restricted by the particular facts of the case to which it referred. We still adhere to the doctrine so well stated by *Gaston, J.,* in *Brooks v. Britt, supra,* that where a swamp is called for, whether the run in the boggy and sunken land, or the margin of such boggy and sunken land, is the call of the grant, depends 'upon facts fit to be proved and proper to be passed upon by the jury'; so that in this case, where there is such a call, it must be governed by that principle, and likewise, where there is a call for Catskin or Catskin Swamp or Catskin Creek, whether the call refers to the run or the boggy or sunken land, it must, under the same authority, depend upon facts 'fit to be proved' and proper to be considered by the jury. This ruling will apply to all deeds not calling for the run in such manner as to leave no doubt that it was intended as one of the lines of the tract."

The court took the right view of the case, and no error is found in the record.

No error.

MRS. GERTIE SMITH AND HUSBAND, ET AL., v. ARCHIE BEAVER ET AL.

(Filed 10 May, 1922.)

Deeds and Conveyances—Husband and Wife—Probate Officers—Statutes—Certificates—Amendments—Subsequent Certificate—Justices of the Peace—Notary Public.

Where a justice of the peace has failed to certify his finding that the deed of the wife's lands to her husband and herself to be held by them in entirety was not "unreasonable or injurious to her," as required, among other things, by C. S., 2515, he may not, after the death of the wife, validate the deed by making a new certificate including this vital finding as of the time of his first probate, or excuse himself upon the ground of ignorance or inadvertence, it being at least required that she should have had due notice of this proposed action, and have been afforded an opportunity to be heard; and the deed itself being void under the statute, the will of the husband disposing of the *locus in quo* is also ineffectual. *Semble*, after executing the first certificate, the power of the justice ceased or became *functus officio;* but this point is not herein decided.

APPEAL by defendant from *McElroy, J.*, at November Term, 1921, of ROWAN.

This was a civil action, commenced by the plaintiff before the clerk of the Superior Court, and transferred to the civil issue docket of Rowan County Superior Court.

1. The plaintiffs brought the action for the partition of the lands in question, which they inherited from their mother, Mary Jane Beaver, as they alleged, the land having been before then conveyed by Simeon J. Beaver (who owned it) and wife, Mary J. Beaver, to said Mary J. Beaver, on 4 March, 1893, registered 15 March, 1893. The defendant, Archie Beaver, answered and set up sole seizin to the lands, claiming under a deed executed 2 November, 1917, by Simeon J. Beaver and wife,

Mary J. Beaver, to Simeon C. Beaver and wife, Mary Jane Beaver, recorded in Book 147, at page 293, and under a will of S. C. Beaver, dated 27 November, 1919 (record, p. 16), devising the land to the said Archie Beaver.

2. S. C. Beaver died in February, 1921, and his wife, Mary J. Beaver, died in July, 1920. This suit was commenced on 20 June, 1921, and summons was served 21 June, 1921. After the summons was served, and long after the death of both S. C. Beaver and wife, Mary J. Beaver, the justice of the peace who took the probate to the deed of 2 November, 1917, executed a new probate, in accordance with the provisions of C. S., 2515. The court refused to admit in evidence the deed with the new certificate. The only point involved in this case is the legal effect of the deed of 2 November, 1917. If this deed is void, the plaintiffs were entitled to recover.

Judge McElroy held as a matter of law that the deed was void, as the probate was not taken in accordance with the provisions of C. S., 2515.

The evidence as to the probate of the deed was substantially as follows:

The following is the probate first taken by the justice on 2 November, 1917:

NORTH CAROLINA—ROWAN COUNTY.

Be it remembered that on this 2 November, 1917, before the undersigned W. L. Kimball, a justice of the peace of said county, personally appeared Simeon C. Beaver and wife, Mary J. Beaver, the grantors named in the foregoing deed, and acknowledged the due execution thereof by them as their act and deed, and thereupon the said Mary J. Beaver, wife of Simeon C. Beaver, being by me privately examined, separate and apart from her said husband, touching her free consent to the execution of said deed, on such separate examination declared she executed the same freely, of her own will and accord and without any force, fear, or undue influence on the part of her said husband, or any other person, and does still voluntarily assent thereto. Therefore, let the said deed, together with this certificate, be registered.

Witness my hand and private seal, date above written.

W. L. KIMBALL, [SEAL.]
Justice of the Peace.

NORTH CAROLINA—ROWAN COUNTY.

The foregoing certificate of W. L. Kimball, a justice of the peace of Rowan County, is adjudged to be in due form and according to law. Therefore, let the said deed, with the certificates, be registered.

JOHN B. MANLY,
Deputy Clerk Superior Court.

Registered 10 November, 1917, at 2 p. m., in Book 147, at p. 293.

To the introduction of the foregoing deed the plaintiffs object. Objection sustained; defendants except.

W. L. Kimball testified for defendants: "I am a justice of the peace of Rowan County, and have been a justice for about 18 or 20 years. On 2 November, 1917, I drew a deed from Simeon C. Beaver and wife, Mary J. Beaver, to themselves. They were both present and gave directions as to how they wanted the deed drawn."

"Q. I want you to state to the jury what directions they gave you as to the drawing of this deed." Plaintiffs object; objection overruled. A. "Mrs. Beaver wanted to make the land to her husband, and in the event one or the other would die, the land would go to the one that would survive. That was the object. That was the way they wanted, and the intention they wanted. This deed that is shown to me is in my own handwriting, and is the one I drew up. I took the acknowledgment of Mrs. and Mr. Beaver, and took her private examination on 2 November, 1917."

"Q. When you took her private examination on 2 November, 1917, I want you to tell the jury what facts, if any, what conclusions, if any, you found on that day, and why you did not embody your findings and conclusions in the certificate of that date?" Plaintiffs object; objection sustained; defendants except.

Questions by the court:

"Q. At the time you took this acknowledgment, did you attempt to do anything else except to take the ordinary private examination of the wife? A. I did ask more questions than I usually do.

"Q. At that time, you didn't mean to set out anything different from the ordinary private examination? A. There was a good deal of discussion and talk.

"Q. You didn't attempt to find the facts and adjudge the matters as required by this section of this Revisal? A. No, sir.

"Q. You didn't know that section was in existence? A. No, sir."

The following evidence was excluded:

"Q. (Defendants' counsel): Tell what conclusions you formed in your own mind when this deed was executed by Simeon C. Beaver and wife to themselves? A. I came to the conclusion that it certainly could not injure her. It never had been her land. It originally belonged to him and, as they both stated, he turned it over to her as protection, and she now turned it back, and in the event of his death it would go to her. She could not possibly be injured in any way. I found this at that time."

To the foregoing the plaintiffs object; objection sustained; defendants except.

"Q. Did you come to that conclusion? A. I came to the conclusion that it could not possibly be injurious to her at that time."

To the foregoing question and answer plaintiffs object; objection sustained. Evidence excluded; defendant excepts.

"Q. After you found out that you had omitted your conclusions from the certificate, and that the law required your conclusions to be embodied in your certificate, did you then file a new certificate to that deed? A. I did."

To the foregoing question and answer the plaintiffs object; objection sustained. Evidence excluded; the defendants except.

"Q. Is this certificate attached to the deed which I hand you, that is, the certificate that you signed on 29 June, 1921? A. Yes, sir."

(This was after the death of both parties, and the new certificate was drawn up on 29 June, 1921.)

"Q. Does this certificate, dated 29 June, 1921, embrace and set out your conclusions you came to on 2 November, 1917? A. Yes."

Plaintiffs object; sustained; defendants except.

"Q. At the time you drew the deed on 2 November, 1917, mentioned in the pleadings, did you know that the law required your conclusions to be set out? A. No, sir."

"Q. If you had known that there was such a law, would you have embodied it in your certificate?" Plaintiffs object; sustained; defendant excepts.

The defendant proposed to show that if the justice had known that the law required his conclusions to be put in his certificate, that he would have put them in, and that his findings and conclusions were omitted through ignorance or inadvertence.

The defendant next offered in evidence the deed dated 2 November, 1917, heretofore introduced in evidence, together with the certificate of probate signed by W. L. Kimball, justice of the peace, on 20 June, 1921, and registered in Book 167, page 99, which new certificate is in words and figures as follows (omitting acknowledgment and privy examination, which are in the usual form):

I further certify that on said 2 November, 1917, I carefully examined into the facts causing the execution of said deed, and found that the original deed was in the name of Simeon C. Beaver, and that he became financially involved, and in order to save his lands, executed a deed to his wife, Mary J. Beaver, and that she held the title to said lands in trust and upon the understanding and agreement to reconvey the same to him when called upon, and that she really had no interest in said real estate; I further find as a fact, at said time, that the said Mary J. Beaver desired to execute a title to her said husband for said lands, and it was the purpose to so fix the title that the survivor should have the land at the death of the other. I also certify that I found as a fact, on 2 November, 1917, that said conveyance of said deed from Simeon C. Beaver and wife, Mary J. Beaver, was not unreasonable or injurious to her, the said Mary J. Beaver, and that no undue advantage was taken of her. All of the foregoing facts were found by me, and the acknowledgment made by Mary J. Beaver on 2 November, 1917, the date of the execution of the said deed, and the date that the probate was made, and that these facts were omitted by me through ignorance of the law, mistake, and inadvertence.

Witness my hand and private seal, this 29 June, 1921.

W. L. KIMBALL, [SEAL.]
Justice of the Peace.

This certificate is to be read in connection with and as a part of the deed heretofore offered in evidence.

NORTH CAROLINA—ROWAN COUNTY.

The foregoing certificate of W. L. Kimball, a justice of the peace of Rowan County, is adjudged to be in due form and according to law. Therefore, let the said deed with this certificate be registered.

J. F. MCCUBBINS,
Clerk Superior Court.

Registered in Book 167, at page 99, on 4 July, 1921, at 10 a. m.

To the introduction of the foregoing deed, with last certificate of probate, the plaintiffs object; sustained; defendants except.

Cross-examination: "I found out that my certificate of probate was improper when this case came up. I dictated my last certificate."

"Q. Could you dictate to the stenographer the certificate? A. Yes. On the private examination of the said M. J. Beaver, she says that she executed the same freely, of her own will and accord, without any influence. I find that she voluntarily said that she executed the deed voluntarily, without any fear of her husband or any one, and that she still voluntarily assents thereto, and that she further said that she wanted Mr. Beaver to have the land, that it was his land, had been his land, and he had given it to her because he had got in a little trouble, intended to make it back as soon as the time came to do it; the time had now come, and she wanted him to have it, in case of his death she wanted it so that the one who would survive would get the land. As to the findings of fact that it was not injurious, this is an unusual certificate, you know. I could not do that. It is not on our blanks. Defendants' counsel prepared the certificate. That is, he typewrote it, but I read it over. I am willing to swear to anything that is on it. It is my certificate, if he did write it."

R. A. Smith testified for defendants: "I was a magistrate and drew a deed from Simeon C. Beaver and his wife, Mary J. Beaver. I do not remember who was present, but I know that he was present, and she also."

"Q. (By defendant) 'You may state what they told you about this deed, the way they wanted it fixed, and what was the understanding, if any, between Simeon C. Beaver and Mary J. Beaver.'" To the foregoing question plaintiffs object; sustained; defendants except.

The defendant proposed to show by this witness the following facts: "I was called to his home to fix some papers for him. He wanted a deed made for the property; that it was Simeon C. Beaver's property and they wanted it made to his wife. I asked why, and he said, 'Well, he got into some trouble some way, and he wished to make the deed to her.' I drew the papers the best I knew how, and the papers were recorded. My recollection was that he wanted a deed made to her in order to keep from paying a certain sum, or something like that; there was some trouble that he was looking for, and he wanted to make this deed to his wife that way."

"Q. Was anything said about how long she was to hold it for him? A. I would not be positive whether there was or not. Four or five years after this deed was made, she asked me if they could sell and make a good title, and I told them that they could, so far as I knew. I do not remember the number of acres."

The judge charged the jury as follows: "In this case of *Smith v. Beaver,* the defendant Archie Beaver relies entirely on the deed dated 2 November, 1917, which S. C. Beaver and his wife attempted to execute to S. C. Beaver and wife. The court instructs you, gentlemen, as a matter of law, that the deed is void, and that S C. Beaver, under whom the defendant Archie Beaver claims, took nothing by it. Now, that being the view of the law taken by the court, it is unnecessary to go further into the facts, as he relies entirely on that deed, and if the deed is void, he had no title whatever to this particular tract of land. The will of S. C. Beaver, so far as this tract of land is concerned, did not pass the title to it, he did not own it, and he could not will it. As I understand it, there is another tract of land about which there is no controversy, devised by Beaver to this same defendant, Archie Beaver, but as the deed was void, any attempt that S. C. Beaver made to devise the land by the will, in so far as this particular tract of land is concerned, conveyed nothing.

"Now, this court submits for your consideration the following issue, gentlemen: Are the plaintiffs the owners in fee simple of an undivided three-fourths interest in the lands described in the complaint, as therein alleged?

"The court instructs you, gentlemen, that if you believe the evidence taken in its light most favorable to the defendant Archie Beaver, you will answer that issue 'Yes.' If you do not believe the evidence, you will answer it 'No.'"

To the foregoing charge, and to the court directing the jury that if they believed the evidence they should answer the issue "Yes," and to the failure to give instructions requested, the defendant excepted.

The jury answered the issue "Yes." Judgment for plaintiff, and exception by defendant, who appealed.

Rendleman & Rendleman for plaintiffs.
B. D. McCubbins and R. Lee Wright for defendants.

WALKER, J., after stating the case: Whatever may be the true rule in cases of this kind, concerning the power of the justice to alter his certificate, as to the probate of a deed and privy examination of a married woman, who was a party to it, he cannot do so long after the probate was taken and the certificate had been made and filed (on 2 November, 1917), and the deed duly registered on that date, when the justice admitted, in answer to questions from the judge, as was done in this case, that "he did not attempt to find the facts and adjudge the matters as required by section of the Revisal, and that he did not even know, at the time (2 November, 1917), that the section was in existence," and it appears that both of the parties to the deed, husband and wife, were dead at the time the justice made an entirely new certificate in which he attempts to find material facts not stated in his first certificate, and essential to have been found and inserted in it at the time it was made.

In the case of *Butler v. Butler,* 169 N. C., 584, this Court, in considering a somewhat similar case, said, through *Justice Allen,* at p. 588: "There is much conflict of authority as to the power of a judicial officer to amend his certificate of probate after the instrument he is probating has passed from his hands, but it seems that the weight of authority is against the exercise of the power (1 Devlin on Deeds, sec. 539 *et seq.*), and all agree that it is a power fraught with many dangers. The higher judicial tribunals are not permitted to correct their records without notice to the parties and without an opportunity to be heard, and if the position of the defendant can be maintained, a justice of the peace, who has no fixed place for the performance of his official duties, may at any time, and when parties cannot be heard, change his certificate of probate and materially affect the titles of property."

The exercise of the power of amendment by a justice in a case of this kind was fully discussed in the several opinions filed in *Butler v. Butler,* *supra,* and we need not extend that discussion but very little in this opinion. The case of *Jordan v. Corey,* 5 Ind., 385, where the Court held that the justice could amend his certificate, is said, in 1 A. & E. (2 ed.), at pp. 552 and 553, and notes, to have been disapproved by the other courts as being wholly unsupported by reason or by precedents elsewhere, and the Supreme Court of Missouri, which at one time adopted the same doctrine in *Wannall v. Kern,* 51 Mo., 150, afterwards disapproved and overruled the case in *Gilbraith v. Gallivan,* 78 Mo., 456, and it was also criticised, and the Court refused to follow it, in *Griffith v. Venters,* 91 Ala., 366 (24 Am. St. Rep., 918), where the subject is fully and exhaustively treated and many authorities cited, showing how the question is viewed by the courts generally of this country. The Supreme Court of the United States had this question before it in *Elliott v. Lessee of Peirsol,* 1 Peters (U. S., 328 (7 L. Ed.), 164, where it was said: "Had the clerk authority to alter the record of his certificate of the acknowledgment of the deed at any time after the record was made? We are of the opinion he had not. We think he acted ministerially and not judicially in the matter. Until his certificate of the acknowledgment of Elliott and wife was recorded, it was, in its nature, but an act *in pais,* and alterable at the pleasure of the officer. But the authority of the clerk to make and record a certificate of the acknowledgment of the deed was *functus officio* as soon as the record was made. By the exertion of his authority, the authority itself became exhausted. The act had become matter of record, fixed, permanent, and unalterable; and the remaining powers and duty of the clerk were only to keep and preserve the record safely. If a clerk may, after a deed, together with the acknowledgment or probate thereof, have been committed to record, under color of amendment, add anything to the record of the acknowledgment, we can see no just reason why he may not also subtract from it. The doctrine that a clerk may at any time, without limitation, alter the record of the acknowledgment of a deed made in his office would be, in practice, of very dangerous consequence to the land titles of the country, and cannot receive the sanction of this Court." There are numerous cases to the same effect. But we will not base our decision of this case upon a lack of power residing in the probate officer to amend his certificate after it has been fully executed, filed, and acted upon by a registration of the deed, or instrument, for we are of the opinion that if such a power exists, it should not extend to a case like the one we are now considering, as before any such power should be exerted, the party (for instance, the *feme covert*) whose interests may be, and likely will be, materially and vitally affected by it, should have had notice of what was intended to be done a reasonable time before it was done, and a fair opportunity to be heard in opposition to it, and to defend and safeguard her rights, and such an amendment should not be permitted after the death of the *feme,* who is by the statute required to be privately examined separate and apart from her husband, and who would be the only witness, except the justice, to the fact, as to whether her examination by him was conducted according to the statute (Rev., 2107; C. S., 2515), otherwise those claiming under her would be completely at the mercy of the probate officer, and this limitation upon his power is more imperatively required because by the statute his findings are made conclusive. That parties are entitled to notice, and a hearing, before substantial and material alterations can in any event be made would seem to require no authority, as *Justice Allen* said in the *Butler case, supra,* and we repeat it here, because of its great importance, even "the higher tribunals are not permitted to correct their records without notice to the parties and without an opportunity to be heard," and further, he said: "And if the position of the defendant can be maintained, a justice of the peace, who has no fixed place for the performance of his official duties, may, at any time and when parties cannot be heard, change the certificate of probate and materially affect the title to property." This matter has been considered in the courts of other jurisdictions. In *Enterprise Transit Co. v. Sheedy,* 49 Am. Rep., 130, the headnote reads: "A notary public, having made and delivered a defective certificate of acknowledgment of a deed, cannot amend it in the absence of the grantor." And the Court said in its opinion: "This attempt to impart life to a void instrument has the merit of novelty. When Mrs. Sheedy affixed her name to the written instrument and acknowledged it, the acknowledgment was confessedly so defective as not to bind her or pass her title to the land. It was then delivered, and eleven days thereafter recorded. More than five months after the acknowledgment was actually taken, and the certificate thereof signed by the notary public indorsed thereon, he wrote and signed a second certificate of acknowledgment. The parties to the instrument did not again come before him, but he certifies what occurred months before. To this last certificate he adds facts not contained in his former certificate, with a view and for the purpose of making valid the writing of a married woman, which was then invalid. Effect cannot be given to this latter action of the notary public." And *Merritt v. Yates,* 71 Ill., 638 (22 Am. Rep., 128), where a similar question was presented, the Court said: "It is also contended that the subsequent certificate, written by the justice of the peace on the deed some years after the first was made, cured the defective certificate, although the deed was not reacknowledged. We have been referred to no precedent for such action, and we would confidently expect that none could be found. Anciently, such acknowledgments could only be taken in open court, and entered on the records of the court in proceedings tedious, expensive, and encumbered with much form. It was at that time regarded of too much moment to be left to the loose and uncertain action of unskilled persons, and the title to property held by married women was guarded with such care as only to permit it to be divested by the judgment of a court of record. Justices of the peace, and the other enumerated officers, have, however, under our laws, been entrusted with the power to take and certify such acknowledgments, and when in conformity with the statute, the act is clothed with the same force and effect that was anciently produced by the judgment of a court of record. It is said that courts of record permit amendments to their records—sheriffs to amend their returns, and compel officers by *mandamus* to perform legal duties. There is no rule more rigidly enforced than that the opposite party must have notice in all cases of amendments of records in matters of substance, and the amendment here is of the very essence of the conveyance itself. And it is true that the court, in a proper case, and on notice to the opposite party, will permit the sheriff to amend his return. *O'Connor v. Wilson,* 57 Ill., 226. But we are aware of no statute or common-law practice which authorizes or in any manner sanctions the right of justices of the peace to amend their records after they have once been made. To allow a justice to make alterations and changes in his records, at will and according to his whim, would be fraught with evil and wrong that would be oppressive. Such a power has not been entrusted to the higher courts, and cannot be exercised by these inferior jurisdictions." The Court further observed that the failure of the officer to properly take and certify the probate may seriously affect the rights of parties, "but that is no ground for violating rules that have governed the purchase and sale of real estate from the organization of our State," and that the defendant must be left to any other remedy he may have in law or equity, if he has any. It was finally held that the deed, the certificate to which was altered, was improperly read in evidence, and for that reason the judgment was reversed. We have a provision in our law (Code, sec. 1266; Rev., 1081; C. S., 3321) for correcting errors in the registration of instruments, but it requires notice and a hearing before any material correction is made therein.

In a case like ours, where the amendment of the certificate is fraught with such grave consequences, the well settled rule as to notice and hearing should not be departed from. For these reasons we have reached the conclusion that the evidence as to the new certificate, and also the other evidence relating to it, and the alteration of the first certificate, was properly excluded by Judge McElroy at the trial of the case.

We again direct particular attention to the fact, before closing, that the justice admitted, when examined by the judge, that "he made no attempt to find the facts and adjudge the matters as required by Rev., 2107 (C. S., 2515), and was not even aware of its existence, and his evidence substantially amounts to no more than this, that if he had known of the law, he would have found the facts and his conclusions thereon and stated them in the original certificate. As said by *Justice Allen,* in *Butler v. Butler, supra,* at pp. 588 and 589, "The remainder of the certificate of that date (1912) is in regular form, and gives evidence of the acts of an official of some experience, and if he then knew that it was necessary to adjudicate that the conveyance was not unreasonable, and not injurious to the wife, and he did so adjudicate at that time, he would have included it in his certificate." The fact that this was not done is strong proof that he is mistaking his findings of 1921 for those which he should have made in 1917, but which he evidently did not make, as the law required, and insert in his certificate. If he did find the facts, why did he do so, if he did not know it was necessary to consider the matter? The evidence, viewed as a whole, is entirely of too unsatisfactory a character to induce a court to act upon it, and reform as solemn an instrument as the acknowledgment and private examination of a married woman.

A full and exhaustive consideration of the general power of a justice, or probate officer, to materially alter his certificate once given and upon which the deed has been registered, will be found in *Griffith v. Ventress,* 91 Ala., 918 (24 Am. Reports, 918).

As defendant relied entirely on the validity of the deed in question, and it being invalid as to Mrs. Beaver, he acquired no title to it under the deed, and consequently none under Mr. Beaver's will, the title remaining in Mrs. Beaver, because the deed not having been executed and probated properly was void as to her. *Kearney v. Vann,* 154 N. C., 311; *Wallin v. Rice,* 170 N. C., 417; *Butler v. Butler,* 169 N. C., 584; *Foster v. Williams,* 182 N. C., 632.

It must be understood that we confine our decision strictly to the grounds stated in it, and it should not be construed as covering the general and broader question as to whether the certificate of a justice, as probate officer, can be materially amended after it has been completed and passed from his possession, and the deed has been registered upon it. We decide the case on other grounds.

There was no error in the rulings and judgment of the court, and it will be so certified.

No error.

T. M. THOMAS ET AL. v. BANK OF BEAUFORT ET AL.

(Filed 17 May, 1922.)

1. Payment—Application—Debt.

Where a debtor owes two or more debts to the same person, the creditor must apply a partial payment thereon in accordance with the direction of the debtor made at or before the time the payment was made.

2. Same—Trusts—Contracts—Banks and Banking—Defalcation.

A defaulting cashier of a bank used a part of the misappropriated funds in his father's business, and after the death of the latter, his heirs at law entered into a written agreement with the bank that the administrator repay the amount of the default out of the father's estate, to the extent available, and the defaulting son by the same instrument pledged certain of his notes and securities to the payment of the balance, the whole amount of the repayment not to exceed a certain sum: *Held*, the bank under the terms of the trust was not entitled to credit the proceeds of the notes and securities of the defaulting son, beyond the specified sum, without the consent of all of the parties to the agreement.

APPEAL by plaintiffs from *Cranmer, J.*, at March Term, 1922, of CARTERET.

Prior to 7 August, 1916, Thomas Thomas was, and had been for many years, the cashier of the defendant bank, and by reason of his misappropriation of the funds and securities of said bank, he was short in his accounts to the amount of $71,000. His father, Alonzo Thomas, was in default as treasurer of Carteret County, and as was also Thomas Thomas, who succeeded him as treasurer. Representatives of the said Alonzo Thomas's estate, Thomas Thomas, and the plaintiff in this case, for the purpose of making safe these shortages to the county, and to the bank, and of presenting to the Governor an application for the pardon of the said Thomas Thomas on the ground that they had been made good, which pardon was thereby obtained, entered into an agreement with the bank 13 March, 1917, hypothecating certain notes and mortgages, among them two belonging to Thomas Thomas, as follows:

"Whereas the parties of the first part have executed their several notes and mortgages to the party of the second part to secure such sums as may be due and owing said bank by the said Thomas Thomas, the former cashier, and whereas it is ascertained and has been admitted that the estate of Alonzo Thomas, deceased, is indebted to the said bank in the sum of $40,476.28 for moneys of said bank used in the business of said Alonzo Thomas, through the said Thomas Thomas, cashier, and it appearing that an administrator with the will annexed of the estate of Alonzo Thomas has been appointed to wind up said estate and pay its debts:

"Now, therefore, the said parties of the first part agree to and with said party of the second part, that said mortgages and notes so executed by them are hereby in all respects confirmed for the purpose of securing said bank to the sum not exceeding $55,000 to be reduced by the application by the administrators of said Alonzo Thomas's estate so far as the assets of said estate coming into their hands for such purpose.

"It being agreed that said notes and mortgages shall be held by said bank only for such sum as may be due to said bank by said Thomas Thomas, not exceeding $55,000, after the payment to said bank of all such sums as said administrators shall realize from said estate of said Alonzo Thomas for such purpose."

At the trial the following facts were agreed upon:

"1. That the plaintiff's two mortgages, together with the mortgage given by Isabella Midgette for $7,000 and a mortgage given by Mrs. Julia Perry for $5,000 and a mortgage given by Thomas Thomas and wife for $8,000 and an assigned mortgage made by Thomas Thomas to the Bank of Beaufort for $2,000, were held by the defendant on 13 March, 1917, both being dated 5 August, 1916, said securities being held at the date of the execution of the instrument dated 13 March, 1913, as copied in the eighth paragraph of the further defense set up by the defendant Bank of Beaufort in its answer filed 17 June, 1920, which instrument of 13 March, 1917, is made a part of this section as fully as if set out in full herein, said two mortgages of plaintiff and ratification dated 13 March, 1917, are hereby agreed to be valid and binding.

"2. That the said $55,000, and interest, is hereby credited with $49,651.68, being $40,478.28, with interest from 1 July, 1916, until 10 April, 1920, paid by the estate of Alonzo Thomas on 24 April, 1920.

"3. That without any agreement, except the agreement of 13 March, 1917, hereinbefore recited, the defendant Bank of Beaufort collected from the Thomas Thomas's assigned note and mortgage, described in the instrument of 13 March, 1917, on 17 April, 1920, $2,000, with interest thereon from 15 August, 1916, amounting to $2,664, and on 23 December, 1920, the defendant Bank of Beaufort collected on the Thomas Thomas $8,000 note and mortgage $5,076.81, being the proceeds of the foreclosure of the said instrument.

"4. It is agreed by the parties hereto that the payment by the estate of Alonzo Thomas shall go as a credit on the $55,000 liability, and it is contended by the plaintiffs that the two items paid from the Thomas Thomas assigned note and mortgage and his $8,000 assigned mortgage shall also go as a credit on the $55,000 liability. It is contended by the defendant Bank of Beaufort that the two said Thomas Thomas items shall be credited on the additional shortage which existed in excess of the $55,000 and interest, said outside shortage being sufficient in amount to consume the two Thomas Thomas payments.

"5. It is agreed that the plaintiff's liability secured on the mortgage deeds is 5/9 of the total balance due on the $55,000 mortgage and interest, based on Isabella Midgette's assuming 7/27 of the total liability and Mrs. Julia Perry's assuming 5/27 of the total liability, and that unless said respective amounts shall be assumed under the mortgage, such as are not assumed are to be hereafter adjusted as to the plaintiffs' liability, and a judgment herein is not to release the plaintiffs from any liability they would otherwise have on them under the facts hereinbefore set out and not to release their property so far as it would otherwise be legally liable for the same.

"6. It is agreed that the court shall pass upon the legal matters involved as to the application of the two Thomas Thomas items, with the right of exception and appeal by the two parties."

Upon this agreed state of facts the court adjudged that "the plaintiffs were not entitled to the credit of the two items of $2,664 and $5,076.81 received from the proceeds of the sale of the two Thomas Thomas items referred to in the third paragraph of the agreed statement of facts," and adjudged that there was a balance due and unpaid on the agreement of 13 March, 1917, including interest, of $17,392.12, interest, and that the defendant bank recover of the plaintiffs 5/9 thereof and the costs, and that the other 4/9 of said debt be treated as set out in the agreed facts, and directed a sale of the property referred to and in the manner prescribed.

The plaintiffs excepted: (1) That the court did not allow as a credit the Thomas Thomas items of $2,664 and $5,076.81, as set out in the above agreement of facts, and appealed.

Ward & Ward and James D. Parker for plaintiffs.
Julius F. Duncan, Moore & Dunn, and Guion & Guion for defendants.

CLARK, C. J. There is only one question raised by this appeal. By the agreement of these parties these securities were dedicated to pay the part of the $55,000 shortage which was not discharged by the Alonzo Thomas estate. The defendant bank, after crediting the $10,000 received from the surety company on the $71,000 shortage, took the two items involved in this controversy without the consent of any person connected with it and applied them to the excess over the $55,000 unpaid after crediting the bond proceeds.

The defendant bank, instead of applying the trust security as required by the contract, without authority from any of the parties of that instrument, applied the two items in controversy to a shortage over and above the $55,000 secured by the agreement.

It is settled law that where a debtor owes two or more debts and makes a payment, it must be applied according to his direction made at or before the time it was made. *French v. Richardson,* 167 N. C., 41; *Stone v. Ritch,* 160 N. C., 161; *Young v. Alford,* 118 N. C., 215; *Moose v. Barnhardt,* 116 N. C., 785; *Vick v. Smith,* 83 N. C., 80. The judgment must be modified by crediting the total amount of which the plaintiffs were charged with 5/9, with the said items of $2,664 and $5,076.81 set out in plaintiff's exception.

It would seem a hardship that as Thomas Thomas is bound for the unpaid part of the excess of $55,000, that these funds should not be credited thereon, but the plaintiffs and the defendant, by the agreement of 13 March, 1917, agreed that these five papers should be applied to said sum of $55,000, and it is agreed therein that the proceeds thereof are to be devoted to the purpose of securing to the bank the sum not exceeding $55,000 to be reduced by the application by the administrators of said Alonzo Thomas's estate as far as the assets of said estate coming into their hands for such purpose; and it was further provided: "It being agreed that the said notes and mortgages shall be held by said bank *only* for such sum as may be due to said bank by said Thomas Thomas, not exceeding $55,000, after the payment to said bank of all such sums as said administrators shall realize from said estate of said Alonzo Thomas for such purpose."

The bank could not, therefore, take the principal debtor's securities under this hypothecation and apply them to outside shortage. It is true that Thomas Thomas is liable for the excess over $55,000, but by this agreement these two securities hypothecated by him were to be applied to the $55,000 debt only, and if not so applied, it would increase to that extent the sum to be collected out of the plaintiffs, the other parties to the agreement of 13 March, 1917, under which the securities were hypothecated.

Reversed.

LEAKSVILLE WOOLEN MILLS v. SPRAY WATER POWER AND LAND COMPANY AND C. R. McIVER.

(Filed 17 May, 1922.)

1. **Appeal and Error—Record—Findings—Equity—Mandatory Injunction.**
   Where the Superior Court, having heard the matter, has granted a mandatory injunction without having formally found the facts upon which it had been issued, the matters involved being purely equitable, the Supreme Court, on appeal, may examine the evidence presented by the parties, form its own conclusions, and therefrom determine whether the plaintiff is equitably entitled to the relief sought.

2. Injunction—Mandatory Injunction—Equity.

The characteristics between the granting of a preventive and mandatory injunction do not now predominate, each requiring the same exercise of caution by the courts as the other; and where the party seeking a mandatory injunction for the protection of easements and property rights has not slept on his rights, and the rights asserted are clear and their violation palpable, the writ will generally be issued without exclusive regard to the final determination of the merits, and the defendant, upon the plaintiff's success, compelled to undo what he has done.

3. Same—Highways—Driveways—Easements—Final Hearing—Issues.

There was evidence tending to show that defendant's land entirely surrounded the manufacturing plant of the plaintiff, except where it had access by a driveway to a public highway; and that the commissioners of the county having refused to construct the highway as the defendant desired, the defendant, through its agent, and in accordance with the agent's previously expressed threat, nevertheless so constructed the highway as to prevent plaintiff's ingress and egress to its plant by vehicles over its driveway; and with such rapidity as to prevent other relief than that by mandatory injunction which he seeks in his action: *Held*, upon the *prima facie* case so established, the plaintiff is entitled to the equitable relief sought, without regard to the final determination of the other facts in controversy as to plaintiff's ultimate rights.

APPEAL by defendants from *Harding, J.*, at chambers, 16 January, 1922, from ROCKINGHAM.

Application for mandatory injunction. There was evidence tending to show the facts to be as follows: Plaintiff is the owner of $1\frac{3}{4}$ acres of land in the unincorporated town of Spray, on which its mill is situated. Its premises, except where the driveway connects with the public road, are surrounded by the lands of the water power and land company and allied corporations. Plaintiff was incorporated and began manufacturing woolen products upon its premises about 1881, and in 1893 acquired certain water rights and a title to its property by deed executed by the water power and land company. A driveway connecting the mill with the public road was used by the plaintiff from 1884 (date of deed), and then continuously until it was obstructed by defendants (December, 1921). The board of county commissioners ordered the Morgan Foard road in Spray to be rebuilt, regraded, and paved with asphalt, and the water power and land company and the Leaksville Woolen Mills agreed to pay one-half the costs. At several meetings of the board of commissioners during October and November, 1921, the defendant McIver, acting as agent of his codefendant, insisted that the road be widened from five to ten feet at the place where it was intersected by the driveway from plaintiff's property. The plaintiff objected on the ground that its driveway would thereby be obstructed, and that it had no other available outlet; and on 9 November, 1921, the commissioners made an order that the road between the Leaksville Cotton Mills and the Leaksville Woolen Mills be narrowed so as not to interfere with the driveway of the plaintiff. On 5 December the commissioners met again and made another order to the effect that the road be widened five feet on the side across from and opposite plaintiff's premises. The defendant McIver then said, in the presence of the board, that if they did not build the road as contended by defendants, he (meaning both defendants) would do so. Early in the morning of 6 December, the defendants, with a force of men and equipment, constructed an embankment upon the driveway about twenty feet in length and seven in height and ten to twelve in width. This embankment obstructed the plaintiff's right of ingress and egress with vehicles. The plaintiff contended that it was entitled to the driveway as an easement, as a right appurtenant to its premises, and incidentally as a way of necessity.

The defendants contended that another driveway or outlet could be provided on the plaintiff's property which would be not less convenient than the other; that the driveway was really on the land of the defendant company, and the plaintiff's use of it was permissive; that the portion of the road complained of was laid out in accordance with the contract made by the water power and land company and the Leaksville Cotton Mills with the board of commissioners; that if the alleged obstruction be removed the road will be left in a dangerous condition; and that plaintiff can be compensated in money. Numerous affidavits in proof of these claims were read by the parties at the hearing.

Judge Harding rendered judgment for plaintiff; defendants appealed.

Clarkson, Taliaferro & Clarkson, Ivie, Trotter & Johnston, and Manly, Hendren & Womble for plaintiff.

P. W. Glidewell, S. P. Graves, and A. L. Brooks for defendants.

ADAMS, J. By application for a mandatory injunction the plaintiff seeks relief from the defendants' alleged invasion of its proprietary rights. In the decree his Honor did not incorporate a formal finding of the facts, possibly because as to questions of fact this court, in matters purely equitable, may examine the evidence and form its own conclusion. We must, therefore, consider the affidavits and the record evidence presented by the parties and determine therefrom whether the plaintiff is equitably entitled to the desired relief.

With reference to their nature injunctions are classified as preventive and mandatory—the former commanding a party to refrain from doing an act, and the latter commanding the performance of some positive act. While in the greater number of instances injunction is a preventive remedy, there is no doubt that the court has jurisdiction to issue a preliminary mandatory injunction where the case is urgent and the right is clear; and, if necessary to meet the exigencies of a particular situation, the injunctive decree may be both preventive and mandatory. Beach on Inj., sec. 97; High on Inj., sec. 1 *et seq.;* 22 Cyc., 741 *et seq.* Under the former practice the mandatory injunction was distinguished by two characteristics: its infrequent use and its indirect terms. The American courts were not inclined to grant such preliminary order, and when they yielded *ex necessitate* they usually accomplished their purpose by a writ which was apparently prohibitory. Bispham's Prin. of Equity, sec. 400 *et seq.* But these characteristics no longer predominate. As to the circumstances under which the writ should be issued, Sir George Jessel, Master of the Rolls in 1875, expressed the opinion that the same caution, neither more nor less, ought to be exercised by courts in granting mandatory injunctions as in granting preventive. Beach, *supra,* sec. 101; *Smith v. Smith,* L. R., 20 Eq., 500. Bispham's statement is almost identical: "Indeed, there would seem to be no good reason why, in a proper case, a mandatory injunction should not issue upon preliminary hearing. Gross violations of rights may occur in the shortest possible time, and a few hours wrongdoing may result in the creation of an intolerable nuisance, or in the production of an injury which, if prolonged, might soon become irreparable. In such cases the interposition of the strong arm of the chancellor ought to be most swift; and if the immediate relief afforded could not, in a proper case, be restorative as well as prohibitory, no adequate redress would, in many instances, be given." Prin. of Eq., p. 638. And as to the indirect terms of the writ, *Walker, J.,* pertinently remarks: "Why not call this process by its right name instead of granting what is really mandatory under the guise of preventive relief? When this is done, we are trying to deceive ourselves, for no good or practical reason, when we know what we are actually doing or what the inevitable effect will be. It is simply adherence to an old form and custom of the court of equity, which did not even gain the approval of some of its ablest chancellors. In modern times, since we try to call things by their true and appropriate titles, so we may be better understood, the decided trend of the courts, especially in this country, is towards a more sensible policy, as we have already shown by authority." *Keys v. Alligood,* 178 N. C., 20.

When it appears with reasonable certainty that the complainant is entitled to relief, the court will ordinarily issue the preliminary mandatory injunction for the protection of easements and proprietary rights. In such case it is not necessary to await the final hearing. If the asserted right is clear and its violation palpable, and the complainant has not slept on his rights, the writ will generally be issued without exclusive regard to the final determination of the merits, and the defendant compelled to undo what he has done. Beach, *supra,* sec. 1019. There are numerous decisions in which various applications of this principle have been made. For example, in *Broome v. Tel. Co.,* 42 N. J. Eq., 141, the defendant, without legal right, went upon the complainant's land and against his protest set up telephone poles. The complainant applied for a mandatory injunction, and the defendant claimed that it should not be required to remove the poles, but at most should only be prohibited from affixing the cross-arms and stringing the wires. But the chancellor said: "Where there is a deliberate, unlawful, and inexcusable invasion by one man of another's land, for the purpose of continuing trespass for the trespasser's gain or profit, and there has been neither acquiescence nor delay in applying to the court for relief, the mere fact that the trespass was complete when the bill was filed will not prevent an injunction in the nature of a mandatory injunction against the continuance of the trespass." Page 143. In *Hodge v. Giese,* 43 N. J., Eq., 342, the complainant and the defendant rented parts of the same building as tenants of one landlord—the defendant occupying the basement and the complainant the first and second floors. In a cellar at the rear of the basement was a heater connected with pipes that heated the two floors above. The only access to the heater was a passway through the basement. The defendant prohibited the complainant's access to the heater. A bill was filed for an injunction to restrain the defendant from excluding the complainant—which in effect was a bill for a mandatory injunction to preserve the complainant's alleged right. Van Fleet, V. C., observing that no remedy would be adequate which did not prevent a repetition of the injury, said: "On the admitted facts of the case, and according to well established legal principles, the legal right on which the complainant rests his claim to an injunction is in my judgment free from the least doubt. This being so, the duty of the court is plain. It is bound to give to the complainant the protection he asks, if the injury against which he seeks protection belongs to the class which this Court may rightfully restrain by injunction. A court of equity may protect and enforce legal rights in real estate, where the right, though formally denied, is yet clear on facts which are not denied, and according to legal rules which are well settled, and the injury against which protection is asked is of an irreparable nature." Page 350.

The principle under discussion has likewise been applied to preserve the right to use a passageway and open court (*Salisbury v. Andrews,* 128 Mass., 336), to remove a structure projecting over the complainant's land (*Norwalk Co. v. Vernam,* 75 Conn., 663), to prevent a continuing trespass (*Hodgkins v. Farrington,* 150 Mass., 19), to remove a fence obstructing access to the complainant's property (*Avery v. R. R.,* 106 N. Y., 142), to redress a continuing trespass (*Wheelock v. Noonan,* 108 N. Y., 179), and to restore the bank of a ditch to the place from which it had been removed (*Keys v. Alligood, supra*). Other illustrations of the principle may be found in an elaborate note to the case of *Moundsville v. R. R.*, 20 L. R. A., 161. The case of *Daniel v. Ferguson,* 2 Ch. D., 27, is directly in point. The plaintiff was the lessee for a long term of three adjoining houses. The defendant prepared to build upon an adjoining lot, and the plaintiff, after inspection of the plans, concluded that erection of the proposed buildings would materially affect the access to his houses of both light and air. After the defendant was notified that a motion for an injunction would be made, he put to work a large number of men who continued building until the wall reached the height of thirty-nine feet from the ground. An injunction *ad interim* was issued and the work ceased. When the original motion was heard the defendant was restrained until judgment or further order from building so as to darken the plaintiff's light and from permitting the wall or building to remain. Referring to the conduct of the defendant, the Court employed this language: "Whether he (defendant) turns out at the trial to be right or wrong, a building which he has erected under such circumstances ought to be at once pulled down, on the ground that the erection of it was an attempt to anticipate the order of the court. To vary the order under appeal would hold out an encouragement to other people to hurry on their buildings in the hope that when they were once up the court might decline to order them to be pulled down. I think that this wall ought to be pulled down now without regard to what the result of the trial may be." Page 30. In affidavits offered by the plaintiff it is alleged that on the day following the final order of the board of commissioners the defendants at an early hour entered upon the plaintiff's property with a large force of men and the necessary equipment and constructed an embankment which completely obstructs the driveway and prevents the use of vehicles in going upon and returning from the plaintiff's property. As to the time and the circumstances under which this work was done, there appears to be no controversy. Whatever their intent may have been, the defendants, with knowledge of the orders made by the board of commissioners, and no doubt in anticipation of the plaintiff's prompt application for preventive relief, by sheer physical force accomplished the object which they had not attained by the orderly process of law. Under these circumstances only one conclusion can be reached. The plaintiff, without regard to the ultimate result of the action, is entitled to a decree compelling the defendants to undo what they have done. Beach, *supra*, sec. 102. The contention that the plaintiff may be compensated in money cannot deprive the court of its equitable jurisdiction. Not only are the damages difficult of assessment, but even if assessed, the plaintiff, if its *prima facie* case be

accepted, would ultimately be deprived of the enjoyment of its property. *Smith v. Smith, supra; Porter v. Mfg. Co.,* 65 W. Va., 636. It is the office of a court of equity, in the administration of equitable relief, in all proper cases to prevent such a result. We regard it unnecessary at this time to decide whether the driveway is appurtenant to the plaintiff's deed, or an easement acquired by adverse user. These and other legal questions discussed in the briefs may be determined on the final hearing. We are concerned now, not with the ultimate disposition of the case, but only with the question whether for the present purpose the plaintiff has clearly shown a *prima facie* right to the relief demanded. 9 R. C. L., 821; 14 *ibid.,* 315 *et seq.; Gray v. Warehouse Co.,* 181 N. C., 166. We think it has.

The judgment of his Honor is affirmed. Let this be certified to the Superior Court of Rockingham County.

Affirmed.

JOHN G. RANKIN v. R. M. OATES.

(Filed 17 May, 1922.)

1. **Trials—Verdict Set Aside—Issue Reversed by Trial Judge—Courts.**

   The trial judge has the authority to set aside the verdict of the jury as to matters in his sound discretion or as a matter of law, leaving the cause at issue, C. S., 591; but he may not change the verdict and thereupon dismiss the action as a matter of law, the exercise of such power being allowed only for want of jurisdiction or upon the ground that no cause of action has been sufficiently alleged in the complaint.

2. **Limitation of Actions—Pleadings—Burden of Proof.**

   Where the three-year statute of limitations is pleaded in defense to an action for wrongful conversion of personal property, the burden of proof is on the plaintiff to show that the action was brought within the time allowed from the accrual of the cause, or that otherwise it was not barred.

3. **Same—Statutes—New Action—Costs—Condition Precedent.**

   The one-year period extended for the bringing of another action after nonsuit upon the same subject-matter, C. S., 415, is applicable only when the costs in the original action have been paid by the plaintiff before commencement of the new suit, unless the original suit was brought *in forma pauperis;* and where the appropriate statute has been pleaded and its time expired both before the bringing of the new action and the payment of the cost in the original one, the second action is barred though commenced within the one-year period, when the original case has not been brought *in forma pauperis. Bradshaw v. Bank,* 172 N. C., 632, cited and distinguished.

4. Appeal and Error—Harmless Error—Courts—Reversal of Verdict—Prejudice—New Trial.

Where the trial judge has erroneously set aside the negative finding of the jury upon the issue of the statute of limitations, and answers this issue in the affirmative and dismisses the action, and it appears on appeal that the same result would have followed as a matter of law, the error will be held as harmless, without injury to the appellant, and a new trial will not be ordered.

CLARK, C. J., dissenting.

APPEAL by both plaintiff and defendant from *Ray, J.*, at December Term, 1921, of GASTON.

Civil action to recover damages for an alleged wrongful conversion of plaintiff's automobile.

Upon denial of liability and issues joined, the jury returned the following verdict:

"1. Did the defendant wrongfully convert to his own use the property of the plaintiff, as alleged in the complaint? Answer: 'Yes.'

"2. Is the plaintiff's cause of action barred by the statute of limitations? Answer: 'No.'

"3. What damages is the plaintiff entitled to recover by reason of the conversion of said car? Answer: '$1,875.' "

After the rendition of the verdict, his Honor set aside the jury's finding as to the bar of the statute of limitations, answered the second issue in the affirmative, as a matter of law, and thereupon rendered judgment for the defendant, dismissing the action and taxing the plaintiff with the costs. Both sides appealed.

Mangum & Denny for plaintiff.
Michael Schenck and Carpenter & Carpenter for defendant.

STACY, J. The court was without authority to reverse the jury's finding on the second issue, answer it himself, and then render judgment on the verdict as amended. *Garland v. Arrowood,* 177 N. C., 373; *Sprinkle v. Wellborn*, 140 N. C., 163; *Hemphill v. Hemphill*, 99 N. C., 436. And it has been held that, after verdict, the same may be set aside and the plaintiff's suit dismissed by the trial court only for want of jurisdiction, or upon the ground that no cause of action is stated in the complaint. *Riley v. Stone*, 169 N. C., 422. A different course seems to have been pursued in *Davis v. R. R.*, 170 N. C., 582, but there the question of procedure apparently was not presented for consideration.

Of course, his Honor could have set the verdict aside as a matter of law or in his discretion; and in either event the cause would then have stood upon the docket for a new trial. C. S., 591. When a verdict is set aside as a matter of law, the losing party may appeal, and the action of the court in this respect is subject to review. *Powers v. Wilmington*, 177 N. C., 361. But the rule is otherwise when the judge acts in his discretion, unless this discretion has been grossly abused and resulted in oppression, which is not likely to occur in any case. *Settee v. Electric Railway,* 170 N. C., 367.

But we are of opinion that the court should have directed a verdict against the plaintiff on the second issue. The defendant having set up the plea of the statute of limitations, as a bar to the plaintiff's right to recover, the burden was on the plaintiff to show that his suit was brought within three years from the time of the accrual of the cause of action, or that otherwise it was not barred. This has been the prevailing rule with us as to the burden of proof where the statute of limitations is properly pleaded. *Tillery v. Lumber Co.,* 172 N. C., 296, and cases there cited.

Admittedly the plaintiff's alleged cause of action accrued on or about 2 May, 1914. The present suit was instituted in the Superior Court of Gaston County, 6 September, 1917, three years, four months, and four days after the alleged conversion. This was too late, unless the plaintiff has otherwise saved himself from the running of the statute.

To meet this situation, the plaintiff offered evidence tending to show that a former suit to recover the automobile in question was commenced in Henderson County on 25 May, 1914, and that said suit remained upon the Superior Court docket of said county until the May Term, 1917, when a voluntary nonsuit was taken therein. Plaintiff contends that under C. S., 415, he is entitled to bring a second action at any time within one year after the judgment of nonsuit in the original cause. This is so, provided "the costs in the original action have been paid by the plaintiff before the commencement of the new suit, unless the original suit was brought *in forma pauperis.*" It is admitted that the original suit here was not brought *in forma pauperis,* and that the costs of said action were not paid by the plaintiff until 14 September, 1921, four years and eight days after the commencement of the new suit.

It was held in *Bradshaw v. Bank,* 172 N. C., 632, that the proviso in this statute does not forbid the plaintiff's bringing a second action without paying the costs of the first, when not otherwise barred by the statute of limitations, but that it does annex such "as a condition to bringing the new action free from the bar of the statute, if pleaded." That is to say, if both suits are brought within three years from the date of accrual of the plaintiff's cause of action, the failure to pay the costs in the original suit will not bar the plaintiff's right to proceed in the second action. But where the pendency of the first suit and the right to bring another within a year after its dismissal is relied upon to repel the plea of the statute of limitations, the plaintiff is required to pay the costs in the original action before the commencement of the new suit, unless the first suit was brought *in forma pauperis.* This is the plain meaning of the words used in the statute and we are not at liberty to disregard its provisions. *Summers v. R. R.,* 173 N. C., 398.

The correct result has been accomplished by the judgment entered below, though irregularly rendered; and as no harm can come from letting it stand, we shall affirm it. *Earnhardt v. Comrs.,* 157 N. C., 234; *Oldham v. Rieger,* 145 N. C., 254. Upon the uncontroverted facts, the plaintiff is not entitled to recover, and any error committed on the trial was harmless. *Cherry v. Canal Co.,* 140 N. C., 426. "A new trial will not be granted when the action of the trial judge, even if erroneous, could by no possibility injure the appellant." *Butts v. Screws,* 95 N. C., 215. The judgment dismissing the action will be upheld.

On both appeals, judgment
Affirmed.

CLARK, C. J., dissenting: This was an action for the alleged wrongful conversion of plaintiff's automobile. Upon the issues submitted, the jury found the first issue in favor of the plaintiff, and in response to the third issue, assessed his damages at $1,875, and answered the second issue, "Is the plaintiff's cause of action barred by the statute of limitations," in the negative.

After the rendition of the verdict, the court set aside the jury's finding as to the bar of the statute of limitations and himself answered that issue in the affirmative as a matter of law, and rendered judgment in favor of the defendant, dismissing the action and taxing the plaintiff with the costs. This, as stated in the Court opinion, was error.

The plaintiff's cause of action accrued on 2 May, 1914, and an action to recover the automobile in question was commenced in the Superior Court of Henderson on 25 May, 1914, and remained upon its docket until May Term, 1917, when a voluntary nonsuit was taken. This action was begun in Gaston County, 6 September, 1917, less than 4 months thereafter. Under C. S., 415, the plaintiff was entitled to bring another action at any time within one year after such nonsuit entered. That section, it is true, provides that the party in interest may commence a new action within one year after nonsuit, reversal, or arrested judgment, "if the costs in the original action have been paid by the plaintiff before the commencement of the new suit, unless the original suit was brought *in forma pauperis.*" This last sentence shows that it was not intended as a statute of limitations, but merely to secure the costs of the officers in the first case. This is of the same purport as the provision that the clerk shall require a prosecution bond, or deposit, or leave to sue as a pauper before issuing a summons, only it is less imperative. In neither case does the statute of limitations run if this is not done. In both cases, if objection is made the judge can allow the defect to be supplied by filing the bond or making the deposit, or in this case, paying the costs, or if he dismisses the case a new action can be brought. The statute does not run, since in both cases the summons was issued and the action was actually pending.

There are numerous analogous cases which show that this is the reasonable intent and meaning of this provision. C. S., 493, is far more peremptory. It provides, "*Before issuance* of the summons the clerk *shall* require the plaintiff to do one of the following: (1) Give an undertaking with sufficient security in the sum of $200, with the condition that it will be void if the plaintiff pays the defendant all costs which the latter recovers of him in the action; or (2) make a deposit of that amount; or (3) obtain authority to sue as a pauper." This is a requirement that one of these shall be done "before the clerk is authorized to issue the summons." Yet it has always been held that though the clerk fails to require any one of these three things to be done, the summons is not void, but the action can be maintained and the court can permit the bond to be filed, or either of these requirements to be complied with after the writ is returned. *Shannonhouse v. Withers,* 121 N. C., 380; *Cooper v. Warlick,* 109 N. C., 673; *Albertson v. Terry,* 109 N. C., 8; *MacMillan v. Baker,* 92 N. C., 115; *Wall v. Fairly,* 66 N. C., 386; *Stancill v. Branch,* 61 N. C., 218; *Russell v. Saunders,* 48 N. C., 432.

It is held that the execution of an undertaking "is an incidental but not an essential condition of an order allowing one to become a party," hence an amendment of the bond may be allowed, *Albertson v. Terry, supra,* and other cases above cited; and the refusal of the judge, after the case has proceeded, to require a prosecution bond is not appealable. *Christian v. R. R.,* 136 N. C., 321. The object of requiring a bond before a summons is executed is to secure the costs of the officers and the requirement is peremptory; yet it is waived if the bond is not given until there is notice and the action of the court, and should the court refuse to permit the bond to be filed, it does not make the proceeding void, but a new action can be begun within 12 months.

In the present case, under C. S., 415, the requirement is for the same purpose of securing the costs, and is not even made peremptory, as in 493, that the costs shall be paid *before* the new summons issues, but it is simply that "if the costs in the original action have been paid before the commencement of the new suit." There is no penalty prescribed to bar the action nor that the defendant cannot be allowed by the court to then pay the costs at any time an objection is made or that if the court refuses this the plaintiff cannot then take a nonsuit and bring a new action within 12 months. The two cases are identical and the requirement is more stringent against the clerk issuing a summons before the prosecution bond given or a deposit made or leave obtained to sue as a pauper. In both cases the summons having issued, without observing the requirements as to costs, the action was pending and the plaintiff's claim was being asserted; hence the statute could not run.

In this case the first action was brought in the county of Henderson and within four months after the nonsuit the present action was brought in Gaston. There was no objection made for nonpayment of the costs and the action pended in Gaston without objection for 4 years. The plaintiff then, on his own motion, wrote for the bill of costs in Henderson, which were $3.30, and paid them on 14 September, 1921, before this action was called for trial and without any objection by the defendant.

In analogy to the construction placed upon the similar, only more rigid, requirement as to giving a prosecution bond, the failure to pay these costs before bringing this action was not fatal. The payment of the same before the time of trying the action was certainly a substantial compliance with the statute and its provisions.

In *Bradshaw v. Bank*, 172 N. C., 632, it was held expressly that this proviso now before the court, "if the costs are paid before the beginning of the second suit," did not forbid the commencement of a second action, but was merely a condition for bringing the new action, and that "a motion to dismiss it before answer filed upon the ground that the costs of the former action had not been paid, would be denied," and in that case *Mr. Justice Walker* said: "It was not the intention to forbid the commencement of a second action merely, without paying the costs of the first (*Freshwater v. Baker*, 52 N. C., 255), but to annex a condition to the right of bringing the new action free from the bar of the statute, and for that purpose to prevent counting the time which had elapsed during the pendency of the first action, the condition being that the costs of the prior action should be paid. Where, however, the statute is pleaded, the reply of the nonsuit will not avail the plaintiff unless he had paid the costs of the former suit. There had been no plea of the statute yet, but only a motion to dismiss, and on this phase of the case the amendment of 1915 has no bearing, as it only applies to the bar of the statute."

What *Mr. Justice Walker* says there is conclusive of this case. In that case there was no motion to dismiss, because the costs had not been paid. The concurring opinion in that case says that this proviso was "a condition precedent, on noncompliance with which the defendant was entitled to have the action dismissed as on failure to give prosecution bond, Rev., 450 (now C. S., 493); or to file appeal bond, Rev., 593 (now

C. S., 646); or on failure of defendant to file defense bond, Rev., 453 (now C. S., 495), *unless the court should extend the time.*" As to the last, it was held that where an answer had been filed without the bond being given, the court would not strike out the answer without notice and giving opportunity to file the bond. *Becton v. Dunn,* 137 N. C., 563, where this is clearly stated. Another parallel instance is under C. S., 7913, which provides that the failure to give in for assessment notes, etc., prevents the holder obtaining judgment thereon, but it has been construed in *Martin v. Knight,* 147 N. C., 564; *Hyatt v. Holloman,* 168 N. C., 386, and *Corey v. Hooker,* 171 N. C., 229, that in such cases the court will permit the amount due on the solvent credits to be paid during the trial, and that this meets the requirements of the statute. In *Martin v. Knight, supra,* at p. 568, it was held that the failure to pay the tax cannot be made the subject of an issue unless pleaded, and in the present case it was not pleaded that the costs had not been paid and no objection was made, and in fact the costs ($3.30) had been paid before the trial was begun.

In all these analogous cases the spirit of the Code of Civil Procedure is that these requirements shall not interfere with the administration of justice, but that when objection is made for noncompliance with these requirements, the judge can allow the condition then to be complied with; or, if he dismisses the action, a new action can be begun within twelve months.

It will be contrary to the entire spirit of the new Code if these technical matters can be erected into absolute bars in the trial of causes upon the merits. It was because of numerous cases of this kind in the old procedure by which a case was dismissed if not brought under a certain form of action or in law when it should be in equity, or *vice versa,* that the new procedure was adopted which had in view solely the trial of cases upon their merits and made the incidental matters of procedure merely directory and not ground for the forfeiture of the rights of the parties, unless there was notice and objection, and gave to the judges full power to permit the execution of the required bond or compliance with other incidental requirements when the failure to observe them had been objected to.

The action of the defendant in this case was a waiver, and the plaintiff had paid the costs before any objection was made, and the judge was without authority to set aside the issue and to dismiss the action.

This requirement of the payment of the costs is also analogous to the situation when there is a demurrer to a complaint because another action is pending, or when the defense is set up that another action is pending and our Court has always held that if the former action is dismissed before the trial that this meets the requirement of the statute and is not fatal to the prosecution of the action then on trial to judgment. *Barnett v. Mills,* 167 N. C., 567, and numerous other cases.

The court was not justified in striking out the answer by the jury to the second issue in favor of the plaintiff and itself entering an answer in favor of the defendant. This was held in the recent case of *Garland v. Arrowood,* 177 N. C., 373, in which the judge below struck out the answer in favor of the defendant and answered the issue in favor of the plaintiff, and *Mr. Justice Walker,* for the Court, said in that case: "The court erred, not in setting aside the verdict as to the second issue, but in answering the issue itself, and thereby reversing the jury's finding" which same error was committed in this case. This anomalous procedure was condemned also in *Riley v. Stone,* 169 N. C., 422. The only case in which it seems to have passed uncondemned was *Davis v. R. R.,* 170 N. C., 582, decided by a divided Court only, and even then this matter of procedure was not considered or decided.

The action of the judge in this case in setting aside the verdict and entering then his own response to the issue is contrary to our precedents and the regular practice and procedure of the court. The case had been on docket four years, and the costs had been paid before any objection made, and the verdict of the jury had been entered in favor of the plaintiff for the $1,875 (which counsel had previously agreed in writing was the value of the machine which the jury found that the defendant had wrongfully taken and converted to his own use). It is an anomally under our reformed and simpler procedure to hold, under all these circumstances, that the plaintiff must lose his property, which he was entitled to recover upon the uncontradicted evidence and by the verdict of the jury, simply because the clerk in another county had neglected to send in a little bill of $3.30 of costs. The statute was intended, not to work such an injustice as this, but simply to secure to the clerk his costs. These were paid to the clerk by the plaintiff, who himself applied for the bill of costs, and the failure to do so earlier in nowise, in right reason, ought to inure to the benefit of the wrong-doer who wrongfully converted to his own use the property of the plaintiff, which counsel had agreed was of the value of $1,875.

The procedure here followed is not only contrary to the merits of the controversy, and an injustice to the plaintiff, but is contrary to all the analogous instances in which more or less similar requirements—such as giving prosecution bond and appeal bond, defense bonds and the like—have not been complied with, and in all of which the judge has permitted the deficiency to be supplied, or if he has dismissed the action on that ground, a new proceeding could be brought within the 12 months after a nonsuit.

I concur with the opinion of the Court in this case when it says that the court below was "without authority to reverse the jury's finding on the second issue, answer it himself, and then render judgment on the verdict as amended. *Garland v. Arrowood,* 177 N. C., 373; *Sprinkle v. Welborn,* 140 N. C., 163; *Hemphill v. Hemphill,* 99 N. C., 436; and it has been held that, after a verdict, the same may be set aside and the plaintiff's suit dismissed by the trial court only for want of jurisdiction or upon the ground that no cause of action is stated in the complaint. *Riley v. Stone,* 169 N. C., 422"; but I dissent from the conclusion that no harm can come from letting this action stand. Such procedure and judgment were contrary to law and the procedure and practice of the courts, and on its face was not only erroneous, but the judgment was entered *"without authority,"* as the opinion in this case states.

During the entire period, from the accrual of the right of action down to the trial, the plaintiff's action against the defendant to recover for the loss of his property, which the jury has awarded the plaintiff (and the value of which counsel agreed to be $1,875), has been pending on the docket, except for less than 4 months elapsing between the nonsuit in Henderson and the beginning of this action in Gaston. There is no statute of limitations which authorized the court to deprive the plaintiff of his recovery, as a matter of law, contrary to the verdict of the jury.

ISAAC H. BAILEY AND WIFE v. THE DIBBRELL MINERAL COMPANY ET AL.

(Filed 17 May, 1922.)

1. **New Trials — Verdict Set Aside — Courts — Discretion—Appeal and Error.**

The discretion given by C. S., 591, to the trial judge to set aside a verdict, is not an arbitrary one to be capriciously exercised, but reasonably with the view to an equitable result in the correct administration of justice, and will not be reviewed on appeal except in cases of abuse thereof.

2. **Same.**

Where the judge orders a verdict set aside, deeming it to be in the cause of justice, and as contrary to the weight of the evidence and in disregard of his instructions of the law thereon, he is acting within the discretion given him by C. S., 591.

3. **Same—Agreement of Parties—Compromise.**

Where the losing party moves to set aside a verdict after the trial, as within the statutory discretion of the trial judge, and the judge intimates he will grant the motion, but the parties agree that he may determine the matter out of the term, in view of attempting to compromise the disputed matter; and not hearing from the parties the judge renews his previous intimation, and sets a time and place for hearing, at which one of the parties appears and refuses the suggestion of the judge as a basis of a just settlement, his then setting the verdict aside within his reasonable discretion deals with the record as it originally stood, and is not an abuse of the discretion given him by the statute, C. S., 591.

APPEAL by plaintiffs from *Finley, J.*, at November Term, 1921, of MITCHELL.

Civil action, under C. S., 1743, to quiet title, or to remove a cloud therefrom, and also to recover damages for an alleged wrongful trespass.

There was a verdict in favor of the plaintiffs, which his Honor set aside and ordered a new trial of the cause. From this ruling the plaintiffs appealed.

Council & Yount, Charles E. Green, and Berry & McBee for plaintiffs.
M. L. Wilson, S. J. Ervin, and S. J. Ervin, Jr., for defendants.

STACY, J. This is an appeal by the plaintiffs from the discretionary ruling of his Honor in setting aside the verdict, as rendered by the jury, and ordering a new trial of the cause. The case was tried at the November Term, 1921, of the Superior Court for Mitchell County. The jury returned a verdict in favor of the plaintiffs, and the defendants at the same term duly entered a motion to have the same vacated and set aside. This motion, by consent, was continued to be heard in vacation at some time and place convenient to the parties and to the court. On 6 January, 1922, the judge wrote counsel for the plaintiffs the following letter:

"I am writing to know if any adjustment has been made in the Bailey case from Mitchell County. If there has been no settlement of this matter, and if your clients have not offered a reasonable settlement, I feel it my duty to set aside the judgment, as it was clearly against the weight of the testimony. However, I hope the matter has been arranged, but I have heard nothing from either side for some time. It will not be necessary to appear and argue the matter before me on the day fixed. I am sending copy of this letter to Messrs. Ervin and Ervin, and after getting replies from both of you, I will announce my decision at once."

Upon receipt of this letter, counsel for plaintiffs appeared before his Honor in Charlotte, N. C., and stated that plaintiffs would agree to lease the property to the mineral company for twenty years at an annual rental price of $250. This his Honor thought was too much, but stated that "if the plaintiffs would agree to execute a lease to the mineral company, or defendants, for 20 years, at the rate of $100 a year, he would sign a judgment according to the answers to the issues as found by the jury." Plaintiffs, through their counsel, declined to agree to this suggestion, whereupon his Honor stated that unless some such agreement were made and carried out he would set the verdict aside, which he did. The order, as signed by the judge, contains the following recital: "And it appearing to the court that the jury, in reaching said verdict, disregarded the instructions of the court, and that the said verdict, finding that the plaintiffs were the owners of the land in controversy, is contrary to the weight of the evidence, and the court, in the exercise of its discretion, deeming a new trial of said cause necessary in the interest of justice: It is considered, ordered, and adjudged that the said verdict of the jury, rendered in said cause at November Term, 1921, of Mitchell Superior Court, be and the same is hereby set aside and a new trial granted."

The right of the trial judge to set aside a verdict in his discretion, as authorized by C. S., 591, is not questioned by this appeal; but plaintiffs contend that the action of his Honor in the instant case was not a sound and wholesome exercise of the discretion which the law reposes in him. In *Settee v. Electric Ry.,* 170 N. C., 365, it was said: "The discretion of the judge to set aside a verdict is not an arbitrary one, to be exercised capriciously or according to his absolute will, but reasonably and with the object solely of presenting what may seem to him an equitable result." And again, in *Cates v. Tel. Co.,* 151 N. C., 506: "It rests in his sound discretion, which should be exercised always, not arbitrarily, but with a view to a correct administration of justice according to law."

Upon the foregoing expressions, plaintiffs predicate their appeal, but we do not think the record discloses any abuse of discretion, or arbitrary or capricious exercise of power on the part of his Honor below. The court had stated that he thought the verdict was clearly against the weight of the evidence, and that he considered it his duty to set it aside. The offer to lease the property for twenty years, at the rental price of $250 a year, then came from counsel for the plaintiffs, which his Honor thought was too much. He suggested, however, that if plaintiffs would agree to execute a lease at a lower rate, he would be disposed to let the verdict stand. This suggestion was in accordance with what his Honor conceived to be a fair and equitable adjustment of the matter; but, as the plaintiffs thought otherwise, the court was left to deal with the record as it stood, without regard to the suggested settlement.

The other exceptions, appearing on the record and relating to the trial of the cause, are not before us for consideration.

The order of the judge setting aside the verdict and granting a new trial, entered as it was in the exercise of his discretion, must be upheld.

Affirmed.

GORDON H. CILLEY ET AL. v. G. H. GEITNER ET AL.

(Filed 17 May, 1922.)

1. **Guardian and Ward — Courts — Jurisdiction—Removal of Estate—Foreign Guardian—Statutes.**

   Where a foreign guardian has been duly appointed in the state of his own residence and that of his wards, and has filed a certified copy of his appointment, with a bond sufficient both as to the amount and the financial ability of the sureties to protect the estate of his wards and in conformity with C. S., 2195, 2196, with his petition to the clerk of the court as required by these statutes, it is not necessary that a local guardian be appointed, but the court in this State, before which the matter is properly pending, may order that the foreign guardian be permitted to withdraw the estate of his wards to the place of foreign jurisdiction.

2. **Same—Real Property—Sales.**

   Where a foreign guardian has complied with the provisions of C. S., 2195, 2196, which authorize him to withdraw the estate of his wards to the place of their residence and to a court of foreign jurisdiction, he may, in the same proceedings, and incident thereto, have the real property of his wards sold and converted into money in conformity with the provisions of C. S., 2180, when the wards are represented therein by their next friend, and it is made to appear that their interests will be promoted thereby, etc.

APPEAL by petitioners from *Bryson, J.*, at Spring Term, 1922, of CATAWBA.

A former appeal, heard at the Fall Term of 1921, is reported in 182 N. C., 714. It is agreed that the record in that appeal shall, so far as applicable, be accepted as the record in this appeal.

The plaintiffs filed a petition before the clerk of the Superior Court of Catawba, in which they alleged that under the provisions of the last will and testament of A. A. Shuford the surviving executors had allotted to the several heirs the property therein described, including the real and personal property allotted to Alda Cilley and Adelaide Cilley, heirs at law of Maude E. Cilley, who was a daughter of the testator. The defendants admitted an agreement for the distribution of the property devised, and denied any inclination to delay the distribution, but insisted that Gordon H. Cilley, surviving husband of Maude Cilley, had no interest in the property, and that they could not recognize any agreement to that effect made by him and Alfred G. Clay, foreign guardian of Ada and Adelaide Cilley.

The plaintiffs prayed judgment that Gordon H. Cilley be decreed to be the owner of a one-third interest, and Alfred G. Clay of a two-thirds interest in the property devised to the heirs of Maude Cilley, that a commissioner be appointed to sell the real estate so devised, that the allotment of the property be confirmed, and the foreign guardian be authorized to remove the assets of his wards to Pennsylvania.

After the decision of this Court was certified, the plaintiffs prayed judgment in conformity with the opinion, whereupon Judge Bryson rendered the judgment following:

"1. That petitioner, Gordon H. Cilley, is not entitled to any right, title, interest, or estate in any of the property allotted by defendant executors to the interest of Maude E. Cilley and belonging to the estate of A. A. Shuford, but the same and every part thereof is the property of his children, Adelaide Harper Cilley and Alda Virginia Cilley.

"2. Inasmuch as no guardian has been appointed in the State of North Carolina for Alda Virginia Campbell Cilley and Adelaide Harper Cilley, the court concludes it has no power to render a decree for a sale of the lands allotted to the interests of Maude E. Cilley, deceased ancestor of the infant petitioners, and cannot order such sale, there being no proper representative for the infant petitioners before the court, although the court is of opinion, and so finds, that a sale of the lands belonging to the infant petitioners would materially promote their interests, and that the facts with respect to such sale are as stated in the petition.

"3. Alfred G. Clay, as guardian appointed by the Orphans' Court of Philadelphia County, Pennsylvania, is not authorized to sue in the courts of North Carolina, and his appearance in this court and cause, and ratification by him as such guardian of the settlement made by the defendant executors, is without legal effect, although for the purposes of this proceeding the court doth appoint him next friend for Alda Virginia Campbell Cilley and Adelaide Harper Cilley, after making due inquiry as to his fitness.

"4. The petitioners have complied with the provisions of the statute with respect to the filing of the bond and certified copies of the appointment of Alfred G. Clay as guardian for Alda Virginia Campbell Cilley and Adelaide Harper Cilley, the bond being sufficient in amount and ability of sureties to protect the estate of his said wards, and the letters duly authenticated, and the court would order the delivery of the personal property allotted to the interest of Maude E. Cilley, and as stated in the petition, to said guardian of Alda Virginia Campbell Cilley and Adelaide Harper Cilley, but the court concludes that it is without power to order a removal of their funds or property to the State of Pennsylvania without the presence before the court of a guardian appointed under the laws of North Carolina.

"5. The court adjudges that the allotment made by the defendant executors to the several persons entitled under the will of A. A. Shuford, and as stated in the petition, is fair, just, and equitable, but there being no guardian representing Adelaide Harper Cilley and Alda Virginia

Campbell Cilley before the court appointed under the laws of this State, the court holds that it is without power to ratify such settlement.

"Wherefore, the court doth adjudge that this proceeding be and it is dismissed, at the cost of the petitioners."

W. B. Council and Mark Squires for plaintiffs.
Self, Bagby & Aiken for executors.

ADAMS, J. His Honor's exclusion of Gordon H. Cilley as the representative of his wife from participation in the property acquired by Alda and Adelaide Cilley under the will of A. A. Shuford conforms to the opinion of this Court, as expressed in the former appeal; but we think his Honor erred in holding as a conclusion of law that the court, in the absence of a guardian duly appointed in this State, had no power to remove the personal property of the nonresident devisees to the place of their residence. Alda and Adelaide Cilley reside in Pennsylvania, and there Alfred G. Clay was duly appointed as their general guardian. His Honor finds from the record that the plaintiffs have complied with the statute in filing a certified copy of the appointment of the guardian in Pennsylvania, and that the bond filed by him is sufficient both as to the amount and as to the financial ability of the sureties to protect the estate of his wards. His Honor also says that he would order the transfer of the fund to the foreign guardian if he had the legal right to make such order.

The statute provides that where any ward . . . residing in another state . . . is entitled to any personal estate in this State, . . . whether the same be in the hands of any guardian residing in this State, or any executor, administrator, or other person holding for the ward, or if the same . . . be not in the lawful possession or control of any person, the guardian . . . duly appointed at the place where such ward . . . resides may apply to have the estate removed to the residence of the ward . . . by petition filed before the clerk, and that the application shall be proceeded with as in case of other special proceedings. Any person may be made defendant to the proceeding who may be made a defendant in a civil action; but there is no absolute requirement that a resident guardian be appointed to defend in such proceedings. C. S., 2195, 2196.

Furthermore, we think his Honor erroneously concluded that the court had no power to order a sale of the real estate of the wards, inasmuch as they had no guardian resident in this State. C. S., 2180, is applicable to a proceeding instituted by a guardian for the conversion of property when the interest of the ward will be promoted thereby, and the proceeds are intended to be used for a special purpose; but since by virtue of the statute the appointment of a resident guardian is not necessary for the transfer of a ward's funds to a nonresident guardian, and since the plaintiffs are represented by their next friend, there appears to be no valid reason why this proceeding should not be maintained to ratify the agreement of distribution, to remove the wards' personal property, and incidentally to convert the wards' real estate into personal property in order to effect such removal.

Our conclusion is that the proceeding can be maintained and accordingly that his Honor's judgment of dismissal should be

Reversed.

A. G. SWAIN AND ROBERT L. SWAIN v. LOUIS GOODMAN, A. J. ROBBINS, ET AL.

(Filed 17 May, 1922.)

1. **Judgment—Demurrer—Pleadings—Estoppel.**

A judgment for defendant upon his general demurrer to the pleadings, not appealed from, is an estoppel as to the cause of action set up in the pleadings, and as effective as if the issuable matters arising from the pleadings had been established by verdict.

2. **Same—Mortgages—Sales—Purchase by Mortgagee—Parol Promise—Statute of Frauds.**

Semble, a judgment in a former action brought for the alleged unlawful acquisition of the mortgaged premises by the mortgagee, under the power of sale, estops the mortgagor in his subsequent action upon an alleged promise of the mortgagee to sell so much of the lands as necessary to satisfy the mortgage and reconvey the remaining part to the mortgagor: *Held*, the former judgment is an estoppel of all matters therein issuable, and a parol agreement to thus satisfy the mortgage debt is void within the intent and meaning of the statute of frauds.

3. **Deeds and Conveyances—Trusts—Parol Trusts—Contracts—Evidence.**

Where, in adjustment of their dealings, a mortgagor has conveyed to the mortgagee by absolute deed a part of the mortgaged premises, and the rights and equities growing out of the relationship has been concluded by judgment of a court having jurisdiction, the mortgagor may not set up a parol trust in his favor in contravention of his own written deed. *Gaylord v. Gaylord*, 150 N. C., 222, cited and applied.

4. **Injunction — Courts — Discretion— Appeal and Error—Continuance Pending Appeal—Statutes.**

Under our recent statutes, the Superior Court Judge, in his discretion, may decide adversely to the plaintiff's application for an injunction, and continue the restraining order pending appeal, on plaintiff's giving adequate security.

APPEAL by plaintiff from *Connor, J.*, at the Fall Term, 1921, of BRUNSWICK.

Civil action, heard on return to preliminary restraining order.

The action is to establish and declare defendants trustees of certain lands, covered by a mortgage executed by plaintiffs, and for an account and adjustment of sales of said property made by defendant, Louis Goodman, who had obtained an absolute deed for a good portion of the property included in the mortgage, and while, in effect, the relationship of mortgagor and mortgagee existed between them. There was judgment dissolving the restraining order, and plaintiffs excepted and appealed.

John D. Bellamy and Lorenza Medlin for plaintiffs.
E. K. Bryan, J. W. Ruark, and C. Ed. Taylor for defendant.

HOKE, J. From the pleadings and facts in evidence, it appears that plaintiffs and one D. L. Swain owned a large body of land in said county, and on 30 October, 1913, D. L. Swain sold his interest therein to plaintiffs, taking therefor $3,500 in payment, secured by a mortgage on property, with power of foreclosure by sale. Thereafter, and before maturing of the note, D. L. Swain assigned and indorsed the mortgage and note to defendant Louis Goodman. That on plaintiff's failing to pay said indebtedness, defendant Goodman, as assignee and holder, undertook to foreclose the said mortgage by exercise of the power of sale, buying in said land through an agent.

The foreclosure being ineffective because the assignment under which defendant held the note and mortgage did not confer such power, *Williams v. Teachy,* 85 N. C., 402, plaintiffs and said Goodman conferred together about further procedure, and it was agreed that in settlement of the controversy between them defendant would convey to plaintiffs, in absolute ownership, fifty acres of said land, and plaintiffs would convey in fee the absolute ownership of the remainder. Pursuant to such agreement, these deeds were executed, the deed to plaintiffs including the dwelling-house and other improvements, and in amount fifty-four acres, and plaintiff, by absolute deed, conveyed to defendant the remainder of the property. That Goodman thereafter divided up the land so conveyed to him into smaller lots and parcels, and had one or more sales of same, plaintiffs being present and bidding for some of the lots, and one of them was bought by defendant A. J. Robbins, who declined to comply with his bid. Defendant Goodman instituted suit and obtained a judgment ordering a sale of land and appointing defendants E. K. Bryan and C. Ed. Taylor commissioners for the purpose, which said decree and judgment was affirmed on appeal to Supreme Court, see *Goodman v. Robbins,* 180 N. C., 239. The opinion having been certified down, the commissioners were proceeding to execute the order of sale when present plaintiffs instituted an action against Goodman, Robbins, Bryan, and Taylor, the defendants also in the instant suit, in which they set forth the facts and deeds by which Goodman claimed the absolute title, alleging that such claim was wrongful and fraudulent, in that Goodman, while occupying, in effect, the position of mortgagee, had taken advantage of his position to force an unconscionable bargain on plaintiffs, and prayed judgment, among other things, that Goodman be declared mortgagee of said lands, subject to account for all sales made by him, and that after payment of the amount due defendant on the original note and mortgage, that plaintiffs be declared owner of the lands remaining unsold, and, in addition, recover of defendant any and all moneys received from sales and from rents of the property, not required to pay the mortgage debt, etc.

Defendant Goodman having fully answered, setting up the entire facts of the transaction, at September Term, 1921, of the Superior Court of Brunswick County, the jury having been empaneled, there was a demurrer *ore tenus,* for want of equity in the bill, and said demurrer was sustained and judgment entered dismissing the action. Thereupon, plaintiffs instituted the present action, setting up substantially the same facts as appeared in the pleadings in the suit just ended, with the additional averment that at the time plaintiffs made to defendant Goodman an absolute deed for the residue of the property, defendant agreed that he would sell off said land, and on payment of the debt actually due on the original purchase-money note, he would reconvey to them the residue, and that by reason of said agreement, plaintiffs having sold enough of said lands to fully satisfy said debt, a trust arises in plaintiffs' favor, and pray judgment that defendant be declared a trustee for use and benefit of plaintiffs for all of the land remaining unsold, etc.

To this complaint defendant fully answered and, on oath, set up the facts as contained in the former suit, and further pleading the judgment in said suit as an estoppel, and also the statute of frauds, requiring contracts concerning land to be in writing. And on these pleadings, and the facts admitted therein, the court, as stated, entered judgment refusing to continue the restraining order prayed for by plaintiffs.

It is the recognized principle that a judgment for defendant on a general demurrer to the merits, where it stands unappealed from and unreversed, is an estoppel as to the cause of action set up in the pleadings, as effective as if the issuable matters arising in the pleadings had been established by a verdict. *Bank v. Dew,* 175 N. C., 79, citing *Marsh v. R. R.,* 151 N. C., 160. The judgment sustaining the demurrer in the former action, therefore, should conclude the plaintiffs as to any and all claims or causes of action arising to them by reason of the alleged fraud or imposition growing out of or dependent on the relationship of mortgagor and mortgagee, or defendant's liability to account by reason of such relationship. *Coltrane v. Laughlin,* 157 N. C., 287; *Propst v. Caldwell,* 172 N. C., 594; *Ferebee v. Sawyer,* 167 N. C., 203; *Tyler v. Capehart,* 125 N. C., 64. And as the promise now relied upon to account for proceeds over and above the mortgage debt is no more than the law would have exacted as a result of the successful maintenance of the former action, it would seem that the judgment on the demurrer in said action would operate as a complete estoppel in the present case.

But whether this be true or not, the judgment in the former case should assuredly be held to estop plaintiff as to all allegations of fraud and liability to account, by reason of the relationship of mortgagor and mortgagee. This being true, plaintiff's present action is necessarily restricted to a demand or claim arising out of his parol promise to reconvey the residue of the land when the mortgage debt had been satisfied. Under our decisions such a claim is clearly disapproved as being in direct opposition to the terms of plaintiff's written deed, and in contravention of our statute of frauds, appertaining to the subject. *Chilton v. Smith,* 180 N. C., 472; *Williamson v. Rabon,* 177 N. C., 306; *Gaylord v. Gaylord,* 150 N. C., 227.

It may be noted that although making an adverse decision on plaintiff's application for an injunction, his Honor, in the exercise of the discretion conferred upon him by the law, continued the restraining order pending the appeal in the cause, on plaintiff's giving adequate security, a course permitted by a recent statute appertaining to the subject, Laws of 1921, ch. 58.

We find no error in the record, and on the facts as now presented this will be certified that the plaintiff's cause of action be dismissed.

Affirmed.

MRS. DOLA STRICKLAND v. S. H. KRESS & COMPANY AND CHARLES H. HAYNIE.

(Filed 17 May, 1922.)

1. **Contracts — Breach — Principal and Agent—General Agent—Implied Authority—Secret Limitations of Authority—Employer and Employee —Master and Servant.**

   The local manager of one of the defendant's chain of stores has implied authority to employ clerks on behalf of his principal by the year, there being nothing unusual in contracts of this character, and where his authority is secretly limited to an employment by the month, and without knowledge or notice thereof, an employee contracts for an advanced position and increase of pay for the following year, and relies thereon, the owners of these stores are liable in damages for the breach of this contract.

2. Same—Slander—Cessation of Authority.

The rule of liability upon the principal for the slanderous words of his agent uttered with his authority implied from transactions within the course of his employment, does not extend to instances where the defamatory words were spoken after the transaction had passed in which the agent was so acting, and after such authority had necessarily determined; as where the husband of a discharged employee thereafter asked the manager of the principal for his reason therefor, which he then gave in defamation of the character of the wife, the plaintiff in the action.

APPEAL by both parties from *Kerr, J.*, at January Term, 1922, of DURHAM.

Civil action to recover damages of defendant company for breach of contract to employ plaintiff for year 1921, and for slander in wrongfully and maliciously charging plaintiff with larceny in January of said year. There was evidence on part of plaintiff tending to show that defendant S. H. Kress & Company is a corporation or partnership, having a number of connected retail stores in different sections of the country, and doing an immense volume of business. That one of these stores is located in Durham, N. C., and defendant Charles H. Haynie is general manager of same. That in 1920 plaintiff was an employee of defendant company, engaged as clerk at the candy counter at $12 per week, and in November of said year defendant Haynie, as manager, expressed himself as greatly pleased with plaintiff's work, and offered to take her into the office for the year 1921. She would receive $24 per week, and if she proved efficient she would be transferred to one of the larger stores at another raise of wages. That plaintiff agreed to this proposition, and entered on her work under the same, when in the latter part of January she was wrongfully dismissed from her employment, and in breach of her contract as above stated.

That soon after plaintiff's dismissal, her husband called at said office to inquire the cause of same, when defendant Charles H. Haynie falsely, wrongfully, and maliciously stated, in effect, to her said husband, in the hearing of other employees, that defendant had taken $10 of the company's money, and lied about it, and went home and pretended to be sick and was afraid to come back to the office because she was afraid that he would catch up with her.

Defendant Charles H. Haynie filed no answer to the complaint. Defendant Kress & Company answered denying any and all liability either for breach of contract or for the alleged slander, and there was evidence on the part of said defendant in support of its said denial, and further to the effect that said Charles H. Haynie, while general manager, was not authorized to hire employees except by the month, and that the alleged contract by the year was entirely beyond his authority. On issues submitted, the jury rendered the following verdict:

"1. Did the defendant Charles H. Haynie, manager for S. H. Kress & Company, contract and agree with the plaintiff for and in behalf of said Kress & Company to pay her $24 per week for her services for the year 1921? Answer: 'Yes.'

"2. Did the defendants breach the said contract? Answer: 'Yes.'

"3. What, if any, damages is the plaintiff entitled to recover by reason of the said breach of contract? Answer: '$725.40.'

"4. Did the defendants wrongfully and willfully speak of and concerning the plaintiff the slanderous words alleged in the complaint? Answer: 'Yes.'

"5. What, if any, damages is the plaintiff entitled to recover for and on account of said slanderous words spoken of and concerning her? Answer: '$2,500.'"

Thereafter, on motion, the court, as a matter of law, set aside the verdict on the fourth and fifth issues as to defendant S. H. Kress & Company, and entered judgment against defendants for the $725.40 damages awarded in breach of the contract. And against defendant Charles H. Haynie for $2,500 damages for wrongful defamation.

Defendants excepted and appealed, assigning errors, and plaintiff also excepted and appealed, assigning error in setting aside the verdict on the fourth and fifth issues as to defendant Kress & Company.

Lee & Harris and S. C. Brawley for plaintiff.
Fuller, Reade & Fuller for defendants.

DEFENDANT'S APPEAL.

HOKE, J. The defendant Haynie has neither answered nor appealed, and the questions presented are in adjustment of the rights of plaintiff as against defendant Kress & Company. In this view, the jury, accepting plaintiff's version of the matter, have found that defendant, through its general manager, had agreed to employ plaintiff for the year 1921 at $24 per week. That such contract had been wrongfully broken, and plaintiff had suffered damages in the sum of $725.40. Judgment has been entered for the amount, and we find no reason for disturbing the results of the trial.

It was chiefly urged for defendant that the facts in evidence showed the defendant had given Haynie no express authority to employ help except for a month at a time, but the contract, in our opinion, was well within the apparent powers of the general manager of such a store. There was nothing unusual in its terms to excite attention or arouse inquiry, and in such case it is held that as to third persons uninformed as to the conditions, the real and apparent authority is the same, and a principal is not allowed to protect himself by private instructions or limitations on the agent's authority, known only to them. The correct doctrine on the subject is very well stated in the first headnote to *Powell v. Lumber Co.,* 168 N. C., 632, as follows:

"A general agent is one who is authorized to act for his principal in all matters concerning a particular business or employment of a particular nature, and he may usually bind his principal as to all acts within the scope of such agency; and as to third persons dealing with the agent, this real and apparent authority are the same, and not subject to restrictions of a private nature placed thereon by the principal, unless they are known to such person, or the act or power in question is of such unusual character as to put a man of reasonable business prudence upon inquiry as to the existence of the particular authority claimed."

A position all the more insistent in this case from the additional facts appearing in evidence that the plaintiff and her husband had made an entire and substantial change of their plans for the year 1921, owing to the agreement to employ the wife for the entire year at the wages specified.

There is no error in defendant's appeal, and the judgment is affirmed.

No error.

PLAINTIFF'S APPEAL.

HOKE, J. It is fully recognized in this jurisdiction that a corporation may be held liable "for the willful as well as negligent torts of their agents, and that the principle, in proper instances, may be extended to actions for slander where the defamatory words are uttered by the express authority of the company, or within the course and scope of the agent's employment." *Cotton v. Fisheries Products Co.,* 177 N. C., 56-59, citing *Cooper v. R. R.,* 170 N. C., 490; *Jackson v. Tel. Co.,* 139 N. C., 347, and other cases.

As said in that opinion, however, owing to the facility and thoughtless way that such words are not infrequently used by employees, they should not, perhaps, be imported to the company as readily as in more deliberate circumstances; that is, they should not be so readily considered as being within the scope of the agent's employment. This suggested limitation on the more general principle is approved with us in the case of *Sawyer v. R. R.,* 142 N. C., 1, where a superintendent, after refusing to employ an applicant for work, proceeded, after such refusal, to abuse and defame the plaintiff, and in holding that the defamatory words could not be fairly considered as within the scope of the superintendent's official duties, the Court quoted from Wood on Master and Servant, sec. 279, as follows:

"The question usually presented is whether, as a matter of fact or of law, the injury was received under such circumstances that, under the employment, the master can be said to have authorized the act; for if he did not, either in fact or in law, he cannot be made chargeable for its consequences, because, not having been done under authority from him, express or implied, it can in no sense be said to be his act, and the maxim previously referred to does not apply. The test of liability in all cases depends upon the question whether the injury was committed by the authority of the master expressly conferred or fairly implied from the nature of the employment and the duties incident to it."

In our opinion this case, and the principle it illustrates, are in full support of his Honor's decision in setting the verdict against defendant aside on the issues as to the slander, for here, more than in that case, the slanderous words could in no sense be considered as within the scope of the agent's employment. On the contrary, the facts in evidence show that the discharge of plaintiff was a closed incident so far as Haynie's official duties were concerned, and the husband had gone to him seeking an explanation, and Haynie, in answer to his inquiry, said, "You come to me like a man and ask me why I discharged her, and I am going to tell you." This was clearly a conversation between the two individuals as to an event that had passed, and, as stated, could in no sense be considered as within the course and scope of Haynie's employment, or as an utterance by authority of the company, either express or implied.

We find no error in either appeal, and the entire judgment, as entered by his Honor, is affirmed.

No error.

J. R. FREEMAN v. J. A. DALTON.

(Filed 17 May, 1922.)

1. **Negligence—Evidence—Questions for Jury—Trials—Automobiles.**

   Where damages for the negligent driving of an automobile is sought in the action, evidence that another was driving the owner's car at the time, in pursuance of his duties as defendant's employee, or about the defendant's business, at excessive speed upon the wrong side of a street, and caused damage to the plaintiff, riding in the opposite direction on his motorcycle, where he had the right to be, is sufficient to take the case to the jury.

2. **Same—Burden of Proof—Appeal and Error.**

   In an action to recover damages, caused to the plaintiff by the alleged negligent driving of the defendant's automobile, where the evidence is conflicting as to the ownership of the automobile or whether the driver was at the time engaged in the business of the defendant, the making out of a *prima facie* case for the plaintiff does not raise a legal presumption of negligence, or cast upon the defendant the burden of disproving by the preponderance of the evidence his ownership, or that the machine was not being operated in his business, or shift the burden of the issue from the plaintiff, but raises only an inference upon which the jury may find the issue in the plaintiff's favor.

3. **Evidence—Automobiles—License Plates—Ownership.**

Where the ownership of an automobile causing damage to another by the negligent operation of its driver, is in question in the action, the license number or plate indicating that the defendant was the owner is competent as a circumstance tending to show his ownership, with other proof thereof.

APPEAL by defendant from *Harding, J.*, at February Term, 1922, of FORSYTH.

This action was brought to recover damages for injuries alleged by the plaintiff to have been caused by the negligence of the defendant, and tried in Forsyth County Court at the May Term, 1921. From the judgment of the latter court appeal was taken to Forsyth Superior Court, which affirmed the said judgment.

The specific allegations of the plaintiff were that in September, 1920, the plaintiff was the owner of a motorcycle, and the defendant Dalton was at that time the owner of a seven-passenger Studebaker touring car, which was being driven by one Boyd Samuels, the agent of said defendant. The plaintiff was riding his motorcycle through Waughtown, a suburb of Winston-Salem, N. C., coming towards Winston-Salem, and running along his right-hand side of the road at the rate of about three miles an hour, and the automobile of Dalton was going in the opposite direction at the rate of about thirty miles an hour, being driven by one Samuels, who was at that time the agent of the defendant Dalton, and using the automobile in the business of Dalton. The automobile of the defendant was being driven along the wrong side of the road at the rate of about thirty miles an hour, and recklessly run into the motorcycle of the said plaintiff, throwing the plaintiff to the ground and injuring him and practically demolishing his motorcycle.

The defendant denied these allegations and alleged that the automobile was not owned by him, but by his wife, and was, at the time of the injury, being used by the Interurban Motor Line, of which the defendant J. A. Dalton was manager, the automobile having been loaned temporarily by Mrs. Dalton to the motor line for the purpose of carrying some passengers to Winston-Salem. That on the driver's return, and as he was passing through Waughtown, a suburb of Winston-Salem, running along the right-hand side of the road at a moderate rate of speed, and while he was in the act of passing some trucks which were parked on his right-hand side, the plaintiff J. R. Freeman suddenly and without any warning to the defendant rode out from between two of these trucks into the street and directly in front of the automobile driven by Boyd Samuels; that observing the dangerous condition created by the plaintiff, Samuels applied his brakes and cut the automobile to the left in an effort to avoid the collision, but that in spite of his efforts there was a collision, from which plaintiff received personal injuries, and from which damage resulted to the motorcycle.

The court charged the jury as follows: "Three issues are submitted to you for the decision of the case. The first issue reads: 'Was the defendant the owner of the automobile which collided with the plaintiff, and was the automobile being used in the business of the defendant?' The burden is on the plaintiff Freeman to satisfy you by the greater weight of the evidence that such was the case. If he has so satisfied you, you will answer the issue 'Yes,' otherwise 'No.' I will say, however, that if the plaintiff Freeman has satisfied you by the greater weight of the evidence that the defendant Dalton was the owner of this automobile, which collided with the plaintiff, that Dalton was at that time the owner of it, the fact that he was the owner would raise the presumption that the automobile was being used in his business, and in that event, that is, if the plaintiff Freeman has satisfied you that Dalton was the owner of the automobile, then the burden would be put on Dalton to show by the greater weight of the evidence that although he was the owner of the automobile, it was not being used in his business. So, if you find that Dalton was the owner of the automobile at that time, you would answer the issue 'Yes,' unless Dalton has satisfied you by the greater weight of the evidence that it was not being used in his business at the time of the collision."

The defendant duly excepted to the charge as above set forth, and to each part of it.

There was evidence on the question of negligence by the defendant, the two acts of negligence alleged being that Samuels, the chauffeur, was driving in excess of twenty-five miles an hour, and that he drove to the left instead of to the right of the open space in the road.

The jury rendered a verdict in favor of the plaintiff; judgment for him, and defendant appealed to the Superior Court, which affirmed the judgment of the county court, and defendant then appealed to this Court.

W. T. Wilson and Wallace & Cohen for plaintiff.
H. M. Ratcliff and Holton & Holton for defendant.

WALKER, J., after stating the case: The first question is whether the learned judge was correct in charging the jury that if they found by the greater weight of the evidence that the defendant was the owner of the automobile which collided with the plaintiff's motorcycle, this fact would raise a presumption that the automobile was being used in the plaintiff's business, and in that event the burden would be on Dalton to show by the greater weight of the evidence that although he was the owner of the automobile, it was not being used in his business. This instruction placed the burden on the defendant, not only to prove, if he was the owner of it, that the automobile was not used in his business, but to establish it by preponderance or the greater weight of the evidence, whereas the burden of the issue was upon the plaintiff throughout the case not only to show that the defendant was the owner of the automobile but that it was, at the time, being used in his business. The defendant had not pleaded any separate or independent defense, but his answer contained solely a denial of the allegations of the complaint, and therefore did not shift the burden of the issue to the defendant, and require him to show affirmatively, and by the greater weight of the evidence, that while he was the owner, the automobile was not being used in his business. The evidence in the case did make out a *prima facie* case for the plaintiff, and entitled him to have the case submitted to the jury without further proof. This is what, we think, was held in *Clark v. Sweaney,* 176 N. C., 529, at pp. 530 and 531, where the evidence was stronger against the defendant than it is here. It was said by the Court there: "The pleadings admit that the automobile was owned by the defendant, Dr. John Sweaney, and that his wife was in the car at the time of the injury, and that their son Fred was driving the car. From this evidence the jury could well draw the inference that at the time of the injury to the plaintiff the son was acting as agent for his father, and 'was about his master's business,'" citing *Moon v. Matthews,* 29 L. R. A. (N. S.), 856; *Stowe v. Morris,* 39 L. R. A. (N. S.), 24.

This does not decide that any presumption was raised "that the son was acting as agent of his father and about his father's business," but that the jury would be warranted in drawing an inference therefrom that such was the case, without further proof being offered by the plaintiff, or appearing in the case. And in *Linville v. Nissen,* 162 N. C., 95, at p. 102, we held as follows: "The plaintiff must not only show that the person in charge was defendant's servant, but the further fact that he was at the time engaged on the master's business. Evidence of the mere ownership of the machine is insufficient. To the same effect is *Sarver v. Mitchell,* 35 Pa. Sup., 69, and numerous cases there cited."

This view of the case keeps it in line with *White v. Hines,* 182 N. C., 275; *Page v. Mfg. Co.,* 180 N. C., 335; *Shepard v. Tel. Co.,* 143 N. C., 244, and the many other authorities cited in *White v. Hines, supra.* There may be a presumption that the car was being used in the defendant's business, but it is not a presumption of law, but one of fact, and it does not shift the burden of the issue to the defendant, in the sense that he must rebut the presumption, or disprove the allegation, that the car was being used in his business, by the greater weight of the evidence. It merely is, in itself, evidence of the fact, and carries the case to the jury. This is fully discussed and explained in *White v. Hines, supra,* and the cases cited therein, where it is said that if the *prima facie* case be called a presumption, the presumption is only evidence for the consideration of the jury and does not change or shift the burden of the issue. *Justice Adams* said in *White v. Hines, supra,* at p. 288: "Such *prima facie* case does not necessarily establish the plaintiff's right to recover. Certainly, it does not change the burden of the issue. The defendant may offer evidence or decline to do so at the peril of an adverse verdict. If the defendant offer evidence the plaintiff may introduce additional evidence, and the jury will then say whether upon all the evidence the plaintiff has satisfied them by its preponderance that he was injured by the negligence of the defendant." And summing up, he further said: "In all instances of this character, after the plaintiff has established a *prima facie* case of negligence, if no other evidence is introduced, the jury will be fully warranted in answering the issue as to negligence in favor of the plaintiff, but will not be required to do so as a matter of law. When such *prima facie* case is made, it is incumbent upon the defendant to offer proof in rebuttal of the plaintiff's case, but not to the extent of preponderating evidence. The defendant, however, is not required as a matter of law to produce evidence in rebuttal; he may decline to offer evidence at the peril of an adverse verdict. If he offer evidence, the plaintiff may introduce other evidence in reply, and the jury will finally determine whether the plaintiff is entitled by the greater weight of all the evidence to an affirmative answer to the issue; for throughout the trial the burden is upon the plaintiff to show by the greater weight of the evidence that he is entitled to such answer." *White v. Hines, supra,* has been approved in two cases decided at this term to the same effect, and which make clear the error in the charge to the jury as to the presumption that the automobile was being used in the business of the defendant. *Harris v. Mangum, ante,* 235, and *Colton Oil Co. v. R. R., ante,* 95. Referring to the nature of the proof and the effect of it in making a *prima facie* case, *Justice Adams* said in *Harris v. Mangum, supra:* "In some of the decisions the word 'presumption' seems unfortunately to imply the right of the plaintiff to recover unless the defendant introduces evidence in rebuttal and to this extent assumes the burden of proof; whereas the 'presumption' is nothing more than evidence to be considered by the jury."

There is evidence in this case upon which the jury could well and reasonably infer that the car belonged to the defendant, and was being operated for him in his business, but the jury should have been allowed to pass upon it and to find the fact without imposing too great a burden upon the defendant to disprove the fact, or to overcome a presumption as to the same fact by the greater weight of the evidence.

The proposition laid down in *Linville v. Nissen,* 162 N. C., at pp. 102 and 103, finds support in what is said by Huddy on Automobiles, sec. 283; *Lotz v. Hanlen,* 60 Atl., 525 (10 Anno. Cases, 731).

We do not see why the fact that the defendant's license number or plate on the automobile was not some evidence, or a circumstance, tending to show, with the other proof, his ownership of the car. There was conflicting evidence about it, but this was for the jury, and, in that respect, the county court and the Superior Court ruled correctly. But there was error in the charge, as we have above indicated, which requires another trial of the issues.

New trial.

W. D. MEYER v. J. F. THOMPSON ET AL.

(Filed 24 May, 1922.)

1. **Deeds and Conveyances—Title—Breach of Covenants—Title Perfected —Nominal Damages.**

Where the covenant of seizin in a deed to lands is broken at the time the conveyance was made, and the defect is incurable, and goes to the entire estate, the amount recoverable by the covenantee in his action is the value of the land as fixed by the consideration agreed upon by the parties, to wit, the purchase money, but subject to an equitable adjustment in our courts administering principles of both law and equity, when it is properly made to appear that the covenantee has acquired title for a lesser sum, when it will be so restricted; and where the covenantor has perfected the title in himself, which, under the covenants in his former conveyance, will inure to the benefit of his grantee, the damages recoverable for the breach of the covenant of title shall be only nominal.

2. **Same—Contingent Interests—Statutes—Sales—Judgments—Confirmation of Sale.**

Where the grantors in a deed have erroneously assumed that they had title to the lands they conveyed in fee, but which was affected by future contingent interest not at present ascertainable, and thereafter bring action to make title under the provisions of C. S., 1744, which authorizes the sale of land affected by such contingencies, and in these proceedings have protected the interests of the remote remainderman by the appointment for them of a guardian *ad litem*, and have fully set forth the facts and circumstances of the former sale, and bring in the proceeds and submit them to the jurisdiction and orders of the court, the final judgment properly authorizing and confirming the sale, and being had in conformity with the provisions of the statute, perfects the title and same will inure to the benefit of the covenantee in the former deed, and for a breach of this covenant only nominal damages are recoverable. *Poole v. Thompson, post,* 588, cited and applied.

APPEAL by plaintiff from *Webb, J.,* at December Term, 1921, of GUILFORD.

Civil action, tried on case agreed, to recover damages for breach of covenant of seizin, contained in a deed made by defendants to plaintiff, said deed having the full covenants usually contained in a fee-simple conveyance of realty. On the facts presented, the court being of opinion that there had been a breach of the covenant, and the damages suffered were only nominal, entered judgment for a penny and costs, and plaintiff excepted and appealed.

King, Sapp & King for plaintiff.

Thomas C. Hoyle, C. R. Wharton, and F. P. Hobgood, Jr., for defendants.

HOKE, J. From the facts agreed upon it appears that B. J. Fisher, owner, died on 15 April, 1903, leaving a last will and testament in which he devised the land in controversy to his wife for life or until her remarriage, with contingent remainder to their surviving children. That on 4 June, 1919, Mrs. Fisher and her surviving children conveyed the said land to defendants, and later, on 1 August, defendants conveyed to plaintiff by deed, with the ordinary and usual covenants in deeds conveying real estate, the purchase price being $21,080, of which $8,380 was paid in cash and the remainder secured by note and mortgage on the property, this last given to Mrs. Fisher and her children. That it appearing on proper investigation that the estate and interest of the children in said property was affected with a contingency that prevented the present ascertainment of the ultimate owners, Mrs. Fisher and her children, with the defendants, purchasers, instituted an action in Superior Court pursuant to C. S., 1744, which authorizes a sale of land affected by such a contingency, and in which the advantages and necessity of the sale was established, the entire proceeds thereof held by the estate brought in and submitted to the jurisdiction and orders of the court, and the interests of the more remote and unascertained contingent remaindermen were represented by guardian duly appointed, and at March Term, 1920, of the Superior Court of Guilford County final judgment was entered in said action authorizing and confirming said sale to defendants and directing that the proceeds be properly secured, etc.

In a case at the present term of *Poole v. Thompson, post,* 588, the Court has decided that the action under C. S., 1744, had the force and effect of validating the title obtained from Mrs. Fisher and her children, and that being true, we are of opinion that his Honor has correctly ruled that plaintiff could recover only nominal damages.

It is the rule in this jurisdiction, and very generally elsewhere, that on a defect in the title the covenant of seizin is broken at the time of the conveyance made, and where such defect goes to the entire estate and is incurable the amount of damages is the value of the land as fixed by the agreement of the parties, to wit, the consideration money, but it is also held with us that this question of damages is subject to an equitable adjustment and in a court like ours, administering principles of both law and equity, when it is properly made to appear that the covenantee has acquired the title for a lesser sum, the damages shall be so restricted. And in case the covenantor has perfected the title in himself, which, under the general covenants in his former conveyance, will inure to the benefit of his grantee, as in this instance, the damages shall be only nominal. *Eames v. Armstrong,* 146 N. C., 1; *S. c.,* 142 N. C., 506; *Bank v. Glenn,* 68 N. C., 36; *King v. Gilson,* 32 Ill., 348; *Baxter v. Bradberry,* 20 Me., 260.

In *Bank v. Glenn, supra,* the Court held: "Our courts, as at present constituted, administer legal rights and equities between the parties in one and the same action; hence, in an action for a breach of covenant it is competent for a defendant to show any equity affecting the measure of damages.

"In an action for the breach of a covenant of seizin, the general rule that the vendee recovers as damages the price paid for the land, with interest from the time of payment, is subject to many modifications, as where his (the vendee's) loss, in perfecting the title, has been less than the purchase money and interest, he can only recover for the actual injury sustained.

"And if, after the sale to the vendee, the vendor perfects the title, such subsequently acquired title inures to the vendee by estoppel; which, being a part of the title, may be given in evidence without being specially pleaded."

And in *Baxter v. Bradberry, supra:* "(*a*) When a party acquires title after a conveyance with general warranty, the title thus acquired inures to the benefit of the grantee, and the grantee then has no right to elect whether or not to reject the title. (*b*) Damages are nominal though the warrantor had not the title when he made the conveyance, if before recovery against him he has obtained the title."

There is no error, and the judgment of the court below awarding nominal damages is affirmed.

No error.

FARMERS AND MERCHANTS BANK ET AL. v. FEDERAL RESERVE BANK OF RICHMOND, VIRGINIA.

(Filed 24 May, 1922.)

1. Banks and Banking—Federal Reserve Bank—Nonmember Bank—Par Clearance.

By amendments, the Federal Reserve Act, under which the various Federal Reserve Banks were organized, was changed to allow these banks to receive from their member banks checks and drafts on nonmember banks within their respective territory, so as to perfect their reserve system, and it is required that no charge for the payment of the checks and drafts, and the remittances therefor by exchange or otherwise, shall be made against the Federal Reserve Bank: *Held*, while nonmember banks within the territory may require these papers to be presented at their institutions to receive the full amount of their face in money, they are without authority to remit for checks sent them by exchange drafts, and in consideration of their waiver of direct presentation demand a discount and thus remit a less amount.

2. Same—State Statutes—Conflict of Laws—Constitutional Law.

A state statute which permits a nonmember of a Federal Reserve Bank to pay by draft, upon its exchange deposit, a note or draft for collection sent through the Federal Reserve Bank and charge a fee for the remittance, being in conflict with the Federal Reserve Act, is not enforceable, the latter act controlling under the provisions of the U. S. Constitution, Art. VI., sec. 2, and the laws made in pursuance thereof, in effect that the Federal Constitution and statutes shall be the supreme law, and binding upon the judges in every state, anything in the State Constitution and State laws to the contrary notwithstanding.

ADAMS, J., did not sit or take part in the determination of this case.

APPEAL by defendants from *Webb, J.*, at February Term, 1922, of UNION.

This action was brought by thirteen banks and trust companies organized under the laws of this State which are not members of the Federal Reserve system against the Federal Reserve Bank of Richmond, Va., to obtain an injunction to prevent the Federal Reserve Bank from refusing to accept exchange drafts drawn by the plaintiffs on their reserve deposits in payment for checks presented at the counter of plaintiff banks, and from returning as dishonored checks drawn by various depositors upon the plaintiff banks which had been presented at their counters by the Federal Reserve Bank of Richmond, but for which the plaintiffs had tendered drafts drawn by them upon their respective reserve depositories. A temporary restraining order was awarded in accordance with the prayer of the complaint. The action having been brought by said banks for the benefit of themselves and such other like institutions who might join in the suit, and the restraining order providing that all such institutions might become plaintiffs in the action, and have the benefit of said restraining order, some 265 State banks and trust companies have become parties plaintiff, as appears from the record.

By agreement between counsel trial by jury was waived, and by consent the judge found the facts, and upon the said finding of the facts adjudged:

1. That the defendant Federal Reserve Bank of Richmond is hereby enjoined from refusing to accept exchange drafts when tendered by the plaintiff banks in payment of checks drawn on them under the option given said banks under provisions of chapter 20, Laws of North Carolina, ratified 5 February, 1921.

2. The said defendant is hereby enjoined from returning as dishonored any check, payment for which in exchange drafts by plaintiff banks, or either of them, has been tendered under the provisions of said act, and the defendant refuses to accept the same.

3. The said defendant is likewise enjoined from protesting for nonpayment any check, payment for which in exchange drafts by plaintiff banks, or either of them, has been tendered under the provisions of said act and defendant refuses to accept the same.

4. The said defendant is likewise enjoined from publication, or authorizing the publication, of the name of any of the plaintiff banks, literally or by inclusion, in any list or other publication designed for circulation among banking institutions generally, regardless of the name employed to designate such list or publication unless and until the bank thus published or included shall have previously given its consent to such publication.

Appeal by the defendant.

Alex. W. Smith and Stack, Parker & Craig for plaintiffs.

Connor & Hill, Henry W. Anderson, M. G. Wallace, and C. W. Tillett, Jr., for defendant.

CLARK, C. J. The defendant Federal Reserve Bank of Richmond is a banking corporation, duly organized under the act of Congress, and especially under a certain act known as the Federal Reserve Act. It is one of the twelve Federal Reserve Banks which were organized under the terms of that act, and does business in accordance therewith, especially with the national banks and state member banks in the Fifth Federal Reserve District, which consists of a portion of the State of West Virginia, the whole of Maryland, the District of Columbia, Virginia, North Carolina, and South Carolina. Under the terms of this act the member banks, which are the national banks in the above mentioned district, and also certain state banks therein, which have qualified for and been admitted to membership in the Federal Reserve system, are required to keep and maintain with the Federal Reserve Bank of Richmond certain balances as reserves. The member banks create these balances by sending to the Federal Reserve Bank for collection checks or other instruments which they have received on deposit or for collection.

Since the business of all banking institutions consists largely in the handling of checks, it is clear that if the Federal Reserve Bank is to discharge efficiently its function as a reserve depository of its member banks, it must be able to collect their checks and other instruments, which are the ordinary means of making settlement of accounts and transmitting funds. When the Federal Reserve Banks were first organized they were not expressly empowered to accept for collection any check unless it was drawn upon a member bank or other Federal Reserve Bank. Since member banks receive checks not only upon other member banks, but also upon nonmember banks, and since the member banks, which include most of the larger banks of the country, acted as agencies through which the nonmember banks collected checks which they had received, it soon became evident that if the Federal Reserve Banks undertook to collect checks upon their member banks, but could not collect for member banks checks upon nonmember banks, a vast majority of checks upon member banks would pass through the Federal Reserve Banks, while checks on nonmember banks would be collected through other agencies.

As the amount of the checks which any bank receives upon others, and the amount of checks upon itself which it is compelled to pay, will usually be about the same, if a Federal Reserve Bank could handle all checks upon member banks, but could receive from member banks only a portion of the checks which they themselves receive, in the course of time the flow of checks would be unequal and the member banks would be placed at a great disadvantage in their efforts to maintain proper reserves. As a consequence, Congress, by the act of 7 September, 1916, and of 21 June, 1917, amended section 13 of the Federal Reserve Act and authorized any Federal Reserve Bank to receive for collection from its member banks "checks and drafts payable upon presentation in its district," thus removing any limitation upon the power of the Federal Reserve Bank to receive checks. From the very nature of a check no person is obliged to consider the drawee, or person upon whom it is drawn, before receiving it either as a holder or as an agent for collection.

Under the law, before the last mentioned amendment to the Federal Reserve Act, Federal Reserve Banks were required to receive checks upon member banks for collection at par, and were, therefore, compelled to require member banks to pay them the full face amount of all checks received. It is obvious that if member banks were compelled to pay the full face amount for all checks handled through the Federal Reserve

Banks, but such banks could not require nonmember banks to pay the full face amount on checks drawn upon them, a great inequality would result, because nonmember banks would, through the agency of their member bank correspondents, collect all checks upon any member bank at par; but would not pay to member banks checks drawn upon themselves at par. With this in view, Congress expressly provided, by the amendment of 21 June, 1917, that no charge for the payment of the checks and drafts and the remission therefor by exchange or otherwise shall be made against the Federal Reserve Bank.

In exercise of the power thus conferred, the Federal Reserve Bank of Richmond undertook to make arrangements with all nonmember banks in its district under which they would agree to remit at par for all checks which the Federal Reserve Bank received upon them. Prior to this time it had been the custom of many small banks, especially those located in remote sections, and thus free from competition, to refuse to remit the full face amount for checks drawn upon them which were sent through the mails, but they insisted that inasmuch as the check called for payment in money at their counters, and not for a remission by draft or otherwise, they could refuse to pay any check until it was presented at their counters, and that, therefore, if they undertook to remit for checks sent them by means of an exchange draft, they could, in consideration of their waiver of direct presentation demand a discount and remit, not the full face amount of checks, but some lesser sum. This is called an exchange charge for remitting for checks. The amount of this charge or discount exacted in consideration of payment by draft rather than in cash varied, but usually ran from 1/10 to 1/4 of 1 per cent upon the amount of all checks so paid.

Many nonmember banks refused to make any agreement to pay the Federal Reserve Bank at par for checks sent them for collection through the mails. The Federal Reserve Bank of Richmond was prohibited by the Federal Reserve Act from permitting any discount to be deducted from the face amount of checks which it held for collection. It sent representatives to the nonmember banks in North Carolina urging them to agree to remit at par, explaining that it believed that such practice would be for the mutual convenience of both parties, and that an insistence by the nonmember banks on their strict legal right to have a check presented for payment at their counters and to pay the same only in legal money would be an inconvenient and expensive method of dealing, not only to the Federal Reserve Bank of Richmond, but also to the nonmember banks. The nonmember banks were at the same time also notified that if they should insist upon their legal rights to require a presentation at their counters of all checks drawn upon them when handled by a Federal Reserve Bank, the Federal Reserve Bank would be compelled to present the checks at their counters by means of duly authorized agents, but if compelled to take this course the Federal Reserve Bank would, after such presentation, refuse to waive its right to insist upon payment in legal tender money.

The Federal Reserve Bank made arrangements with certain residents of the towns in which various nonmember banks were situated to collect checks as its agents by means of personal presentation, or it sent an employee to such town to act as its agent.

On 15 November, 1921, the Federal Reserve Bank of Richmond gave notice that it would collect checks upon all nonmember banks in North Carolina by sending them through the mail if the bank would agree to pay the full amount due upon the checks, or by personal presentation by the agent if the nonmember bank refused to pay the full face amount of the check unless presented personally at its counter.

The Legislature of North Carolina, Laws 1921, ch. 20, authorized State banks in North Carolina to charge a fee not in excess of 1/8 of 1 per cent on remittances covering checks, or a minimum fee of 10 cents, and provided that in the event a Federal Reserve Bank, postoffice, or express company should present checks at the counters of the drawee bank and demand payment in cash, such drawee bank should be permitted to pay by means of a draft drawn upon its exchange deposit, excepting, however, checks payable to the State or to the Federal Government, and checks upon which the drawer had expressly designated to the contrary. The defendant bank, being advised that this statute was unconstitutional, presented the checks at the counter of the drawee bank, demanding the full amount due and returned the checks as dishonored when payment in money was refused. In returning checks which had been so presented, the Federal Reserve Bank of Richmond was careful to state that the check had been duly presented, and that payment in money at its face amount had been demanded, but had been refused, as the drawee bank claimed the right to discharge its obligation by its own draft.

The plaintiffs in this proceeding sought to restrain the Federal Reserve Bank of Richmond, from returning any check presented under these circumstances, and to require it to accept an exchange draft from the plaintiffs when any check had been thus presented to them, regardless where such exchange draft was payable, or whether or not the payment of it could be indefinitely postponed, as suggested in the argument, by a succession of such exchange drafts.

The plaintiffs, however, in addition to the economic effect of the Federal statute, which forbids the payment by the Reserve Bank of a charge for collection of checks, thus forcing, as they claim, all collection to be made through the Federal Reserve Banks, who can thus collect without charge, made the further allegation that the defendant was undertaking to coerce the nonmember banks to abandon their right to charge for remitting for collection of checks upon them by saving up checks over a considerable period of time until they reached a large amount, and then demanding them at the counter with the probable effect of driving the bank into liquidation.

We need not consider this allegation, which was not only denied by the defendant, but which the court has found as a fact to be untrue, and the plaintiffs have taken no exception to such finding. It would be unnecessary to notice this proposition, but that such conduct was condemned by *Mr. Justice Holmes* in the case of the *American Bank and Trust Co. v. Federal Reserve Bank of Atlanta,* opinion filed 16 May, 1921. That decision was rendered upon a demurrer, on which, of course, the Court assumed that all the allegations of the bill and all reasonable inferences from them were true. The finding of fact on the trial in the present case eliminated this question entirely from our consideration.

The record and briefs in this case are voluminous, and the argument has been very elaborate and able, as the importance of the case demanded.

The Federal Reserve Bank, under the provisions of the Federal statute, has the right to receive for collection a check drawn upon a nonmember bank, or upon any other person within its district under the clear, unmistakable terms of the act.

The amendment made 21 June, 1917, to section 13 of the Federal Reserve Act provides that no charge for the payment of the checks and drafts and the remission therefor for exchange or otherwise shall be made against the Federal Reserve Banks.

The real question, therefore, presented for us is whether the Legislature of North Carolina can, by the act above mentioned, Laws 1921, ch. 20, interfere with this provision or regulation of the Federal corporation by a valid act of Congress by providing that a State bank need not pay its obligations in lawful money when checks, which upon their face are unconditional orders for the payment of money, are presented by Federal Reserve Banks.

The question may be presented concretely by this homely illustration: Suppose a farmer or merchant or other citizen of this State should send his check for $1,000, drawn on a bank in this State, in payment of a purchase of goods or other article, to New York. The person receiving it would place this check, in the ordinary course of business, to his credit in some bank in that city, which bank, in ordinary usage, would sometimes charge for collection a small sum based upon the interest for the time usually occupied in sending the check to the bank here, and the return of the collection to the bank in New York. As to this charge, which is a matter between the depositor and his bank, there is no controversy here. When such check is sent to this State it has been not unusual heretofore for the bank here to make its remittance by exchange on New York, and to charge a fee for the service, but since the amendment to section 13 of the Federal Reserve Bank Act of 21 June, 1917, if such check from New York is remitted through the Federal Reserve Bank no charge can be made for exchange in remitting the proceeds, and if the bank here should remit anything less than the face of the check, $1,000, to the Federal Reserve Bank, the Federal Reserve Bank, in observance of the provisions of the above amendment to section 13, will refuse to accept it as payment, and notify its correspondent in New York why the check has been protested for nonpayment. The plaintiffs complain that the result is that all checks will be sent for collection through the Federal Reserve Banks system, but that is an economic result with which this Court has nothing to do. This may or may not have been the intention of Congress in making the amendment, but the Federal Reserve Bank Act has been held valid, and the amendment of 1917 was a valid regulation over the corporation created by it which Congress had the power to make. Conceding that Congress cannot require the bank here to remit without charge for its trouble, its statute prevents the Reserve Bank from allowing such charge (and the total of such charges if made throughout the country would amount annually to $135,000,000, and to over $1,000,000 in this State alone), and the Reserve Bank has no alternative except to demand payment of the face amount over the counter in legal tender, from which no state can release the paying bank without violation of the U. S. Constitution, and of its obligation to the drawer and the destruction of its business by the protests of the checks of its customers.

The statute of North Carolina, Laws 1921, ch. 20, was intended for the benefit of the State banks in this State, by authorizing them to continue to charge exchange for remitting by draft or otherwise for checks sent to them through the mails, but that policy, however desirable for such banks, is clearly in conflict with the valid constitutional provision of the Federal statute. No act of this State can authorize the drawee bank to pay less than the face amount of the check drawn upon it by its depositor or to remit its check in payment or pay it otherwise than in legal tender money. Nor can it require that the Federal Reserve Bank shall pay a fee, or that the bank here may remit less than the face value of the check when the Federal statute forbids such charge. It is true that the Federal Reserve Bank, as holder of the check, has no contract rights with the drawee bank until the check is presented, but as holder it can require payment of the face amount of the check in legal tender, and under the act of Congress it cannot pay a deduction from that face value by accepting a remittance to the Reserve Bank of a lesser amount.

The Reserve Bank always incloses with the check sent to the payee bank a stamped and addressed envelope for the check to be remitted in payment, which must be for the face amount of the check sent.

The Federal statute, being a regulation of the Federal corporation by Congress, the act of this State authorizing the paying bank here to exact exchange is in direct conflict with the duty imposed upon the Federal Reserve Bank by the act of Congress and the Reserve Bank is restricted by its duty to observe the provision of the Federal act and refuse to receive a check for less than the face amount of the check sent by it for collection. It is true it cannot enforce payment of the face amount except by personal presentation of the check at the counter of the paying bank, but it has a right to refuse a check sent to it by the paying bank for less than the full face amount, and to protest the check it has sent here for collection for nonpayment. The matter then becomes one between the drawer of the check and the paying bank who refuses to pay it.

The U. S. Constitution, Art. VI (sec. 2), provides that the Constitution of the United States, and the laws made in pursuance thereof, "shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." In the matter before us the act of Congress which provides that no exchange shall be allowed by the Reserve Bank for remitting for the collection of any check by any bank is in direct conflict with the statute of this State authorizing the paying bank to remit a lesser amount than the face amount of any check paid by it if presented by the Federal Reserve Bank. In this conflict of authority the Federal law is supreme. The injunction, therefore, was improvidently granted, and the judgment must be

Reversed.

ADAMS, J., not sitting.

CANNON MANUFACTURING COMPANY ET AL. v. COMMISSIONERS OF CABARRUS COUNTY AND H. W. CALDWELL, TAX COLLECTOR.

(Filed 24 May, 1922.)

1. Taxation—State Tax Commission—Report of Property Valuation—Statutes—Adoption by Legislature—Powers—Functus Officio—Injunction.

The State Tax Commission was *functus officio* after the Legislature had approved and adopted its final report of the assessment and value of property, made in pursuance of Laws 1919, ch. 84, transmitted through the Governor, and could not thereafter, pending appeal or otherwise, order a reduction in the value of the property of a certain manufacturing plant in a county that is incorporated into the value of the property of that county upon which the necessary taxes were to be computed; and where the county has collected the taxes upon this reduced valuation, a permanent injunction against the proper officers of the county from collecting taxes upon this difference in valuation is improvidently allowed, and will be dissolved in the Supreme Court, on appeal.

2. Injunction—Issues of Fact—Questions for Jury—Taxation—State Tax Commission.

Where it is in controversy upon the pleadings and affidavits whether the State Tax Commission has allowed a decrease in the value of property of a large manufacturing company, and the corporation has sought a permanent injunction against the proper officers of the county from collecting this alleged excess, an issue of fact is raised for the determination of the jury, and it is error for the Superior Court judge to make permanent the temporary restraining order theretofore issued; but upon the record of this appeal a new trial is not ordered, it appearing that the injunction must be dissolved on another ground.

APPEAL by defendants from *McElroy, J.*, at August Term, 1921, of CABARRUS.

This is an action brought by the plaintiffs, the four Cannon Cotton Mill Companies, for a restraining order and permanent injunction against the defendants to restrain and prevent them from collecting certain taxes which were levied by the board of commissioners of Cabarrus County at their meeting on 3 September, 1920, for that year against the property of the plaintiffs, and duly certified to the defendant sheriff and tax collector about 1 October, 1920.

The ground on which the plaintiffs ask this restraint is an alleged order of the Corporation Commission of 4 January, 1921, reducing the amount set out by the order of the county commissioners at their regular meeting in September, 1920, and directed by the tax list to be collected upon the property of the plaintiffs.

The defense set up by the county commissioners and the sheriff and tax collector is that, as appears by the record, the amount ascertained and assessed against the plaintiff's four mills on 1 May, 1920, was $19,480,308; that from this valuation the plaintiffs appealed, and that the State Tax Commission authorized and instructed the local authorities of Cabarrus to reduce said valuation of the four mills to $16,961,308; that subsequently the State Tax Commission, to complete its work before it made its report to the Governor, as required by Laws 1919, ch. 84, called the county supervisor and the county board of appraisers and review to Raleigh for further consultation and conference with the State Tax Commission, and as a final concession and settlement of the valuation of the property in Cabarrus County, authorized the county supervisor of said county in making his final report to allow a further reduction of $3,000,000 to "cover any variations that might arise," and this was done, as shown at bottom of page 51 of the record in this case;

and that all the said $3,000,000 was apportioned solely and entirely to these plaintiffs, reducing the valuation of their combined property, as the defendants claim, to $13,961,308 (no part of said $3,000,000 reduction having been apportioned to any other mill owner or any other taxpayer whatever in said county), and this amount was assessed by the defendants, county commissioners, as the basis calculated by them of the tax to be collected on the plaintiffs' mills for the fiscal year 1920, and the tax list so calculated was placed in the hands of the sheriff for collection, and upon which the county is seeking to recover the taxes which the plaintiffs are endeavoring to restrain.

On 10 August, 1920, the Legislature met in extra session at the call of the Governor, and at that date, in its final report on valuation, which the Governor transmitted to the General Assembly, the Tax Commission, on page 1, uses these words: "We have the honor to report the successful *completion* of this work, and present herewith the tabulated result." On page 4 the commission says: "We are assured that such values have been made as will place upon these industries a fair share of the public burden, and certainly it will be more equally distributed among them than under the former methods of valuation. The work in this line was in the nature of assistance to the local boards by whom the *final valuations* were made," and at its conclusion they express their "feeling of relief that the arduous task is *complete.*" In this report, which the Legislature adopted, the taxable value of the property in Cabarrus is stated to be $49,473,505.

In sec. 1, ch. 1, Laws, Extra Session 1920, ratified 26 August, the General Assembly enacted, "The assessment or valuation of property made under the provisions of Laws 1919, ch. 84, is *hereby approved* by the General Assembly and adopted as the basis for the levy of tax rates for the State, and all subdivisions of the State for which taxes are levied for the year 1920," and in section 5 of said chapter authority is given and provision made for the boards of commissioners of the various counties of the State to levy taxes for the various counties in conformity with this valuation for the year 1920. It appears from the record that on 30 August, 1920, the certificate from the State Tax Commission of said valuation for the county had been received, and at the regular meeting of the defendants, 3 September, the county commissioners, in accordance with the said act of the Legislature, the assessment was made out against each taxpayer, and about 1 October this tax list was placed in the hands of the sheriff, and he was proceeding in the exercise of his duties to collect the taxes so assessed and levied.

The plaintiffs sought to enjoin the collection of $22,342.17 of the taxes charged against them on this tax list, in the hands of the sheriff upon the allegation that on 4 January, 1921, the State Tax Commission reduced the previous assessment on their property which had been placed on the tax list by the county commissioners under authority of the act of the Legislature, by the sum of $4,654,619, leaving the assessment of the plaintiffs' property reduced to $9,306,689, and ask this injunction against the collection of any taxes on the amount of said reduction. The judge granted the injunction asked for, and made it permanent, from which the defendants appealed.

J. L. Crowell and Cansler & Cansler for plaintiffs.
H. S. Williams for defendant.

CLARK, C. J. The original assessment of the plaintiffs' mills for taxation on 1 May, 1920, was $19,480,308. This was reduced by the State Tax Commission, on appeal, to $16,961,308, and later there was an order of the commission allowing to the county of Cabarrus the further rebate on its total valuation of $3,000,000, all of which was applied to reduction of the tax valuation of the plaintiffs' property; no part of the same being allotted to any other mill owner or other taxpayer whatever in Cabarrus. By these reductions the valuation of the combined mill property of the plaintiffs was reduced to $13,961,308, upon which amount the county commissioners of said county based their tax rate for the fiscal year 1920, and upon which the said county was seeking to collect its taxes.

On 10 August, 1920, the State Tax Commission made their final report of the assessed value of the property for taxation in each county, in which the valuation for Cabarrus County was $49,473,505.

In paragraph 7 of the further answer of the defendants (record, page 18), it is alleged as follows: "The total valuation of all property in Cabarrus County fixed in said report was $49,473,505, and the original and lawful assessments of the property of the complainants as fixed and determined by the board of appraisers and review, on which taxes are now sought to be collected were included in this valuation so reported by the Tax Commission to the General Assembly, extra session 1920."

In the replication to this by the plaintiffs on page 28, paragraph 7, it is said: "Paragraph 7 is admitted, except that it is denied that the assessment made against the property of these plaintiffs by the board of appraisers and review of Cabarrus County was lawful, and except that it is alleged that said report was made subject to the right of the State Tax Commission to change the valuation so placed by the board of appraisers and review of Cabarrus County upon the property of these plaintiffs, from which appeals were pending before the said commission when said report was made and when the special session of the Legislature adjourned."

This presents clear-cut the matter at issue in this proceeding. The tax assessment against Cabarrus County reported by the State Tax Commission, and transmitted by the Governor to the General Assembly, 10 August, 1920, was ratified and made final by sec. 1, ch. 1, Public Laws, Extra Session 1920, reading as follows: "The assessment or valuation of property made under the provisions of Public Laws of 1919, ch. 84, is hereby approved by the General Assembly, and adopted as the basis for the levy of tax rates by the State and by all subdivisions of the State for which taxes are levied for the year 1920, and the valuation of real property so fixed shall be adopted for the years 1921, 1922, and 1923, except that such valuations may be hereafter changed according to law."

There is in this statute no exception or authority, by reason of any alleged pending appeals or otherwise, for the State Tax Commission to change this final assessment so approved by the General Assembly.

The plaintiffs, however, contend that by action of the State Tax Commission on 3 January, 1921, the valuation of the property of the plaintiffs was reduced by a further allowance of $4,654,619, leaving the total assessments for taxes against the plaintiffs of $9,306,689, and asked an injunction against the collection of taxes in accordance with the tax list in the hands of the sheriff on said $4,654,619 by reason of this alleged reduction.

The defendants, the county commissioners and sheriff, filed an answer denying that in fact the State Tax Commission, on 3 January, 1921, had made such reduction, and also denied that it was lawful if it had been made. The defendants also excepted to the evidence in that there was no statement certified down by the State Tax Commission of such alleged reduction by the signature of either of the tax commissioners, nor under the seal of the Tax Commission, and they objected to the introduction of evidence upon these grounds, and also because there was no evidence of the signature even of the clerk who had written the letter making such statement, and they also introduced the affidavit of a former clerk of the State Tax Commission, in whose hands all appeals had passed down to 1 November, 1921, that there was no appeal pending in which said reduction could have been allowed, and that the chairman of the State Tax Commission had admitted that there had been no such order of reduction attempted by the State Tax Commission as alleged by the plaintiffs.

In view of the issues of fact raised by the pleadings and on the evidence, it was error, in any view, for the judge to grant a permanent injunction against the collection by the sheriff of $22,342.17 which had been duly assessed by the tax list against the property of the plaintiffs for the issues of fact could only be determined by a jury.

However, it is not necessary to grant a new trial upon this ground, for upon consideration of the report of the Tax Commission made to the Governor and transmitted by him to the General Assembly as the final assessment of the property in the 100 counties of the State, and the enactment by the Legislature on 26 August, 1921, above set out, we are of opinion that there was no authority in the State Tax Commission, whether there were or were not appeals pending from any county, to change or modify in any way the action of the General Assembly which in its terms was final.

Whether or not there was any action by the State Tax Commission subsequent to the ratification of that act attempting to modify the valuation assessed against the plaintiffs as embraced in the report of the State Tax Commission and the act of the Legislature, the State Tax Commission was *functus officio* as to any power to change in any way the valuation of the plaintiffs' property if it was attempted in January, 1921, as alleged, and the injunction appealed from must be set aside, and the sheriff of Cabarrus will proceed to collect the taxes assessed against the plaintiffs according to the list placed in his hands by the commissioners in October, 1921, and therewith collect the deferred interest on the amount which appears on the tax list to be still due and unpaid by the plaintiffs according to the tenor of the mandate to him directed by the defendants, county commissioners.

Reversed.

W. L. BREWINGTON v. FRANK LOUGHRAN.

(Filed 24 May, 1922.)

1. Landlord and Tenant—Leases—Contracts—Covenant—Breach—Verdict—Abandonment of Contract.

Where the plaintiff, a lessee of defendant's barber shop, equipment, etc., alleges a breach of contract by the defendant in failing to perform a covenant to furnish sufficient hot water for the purposes of his business, a verdict by the jury that defendant had breached his contract does not alone, or in the absence of a stipulation in the lease to that effect, justify the plaintiff in abandoning the leased premises during the period of the lease, and recover full damages caused by the defendant's breach.

2. Same—Notice to Landlord.

The lessee of a barber shop is not justified in abandoning the leased premises or in suing for full damages for the alleged breach of the lessor's contract in failing to supply a sufficiency of hot water for his customers, unless otherwise stipulated in the contract, without putting the lessor in default by affording him a reasonable opportunity, after notice, to comply with the terms of his agreement. Instances in which the breach of a covenant of lease would make it impossible or impracticable for the tenant to remain, distinguished.

3. Leases—Contracts—Abandonment.

In the absence of provisions in the lease, the degree of dereliction or default on the part of the landlord that will justify the tenant in abandoning the leased premises and absolve him from paying the rent, and justify him in suing for full damages, is a question that must be determined by the facts and circumstances of each case; but the ordinary rule applicable is that a contract is considered to remain in force until it is rescinded by mutual consent, or until the opposite party does some act inconsistent with the obligations imposed on him by the contract, that amounts to an abandonment of it on his part.

4. Landlord and Tenant—Leases—Contracts—Damages—Trades—Breach —Profits Prevented—Speculative Damages.

The lessee of a barber shop brought action against his lessor to recover damages, alleging the latter's breach of covenant in failing to supply a sufficiency of hot water for his customers: *Held*, the probable losses to his business on that account were too speculative or remote to be recoverable, and an instruction that the jury may consider this element of damages in their verdict constitutes reversible error.

5. Landlord and Tenant—Leases—Breach of Covenant—Damages—Value of Lease.

Where the lessor's breach of his covenants of lease amounts to an abandonment, justifying the lessor's action for full damages, the rule applicable is that the amount recoverable must be such as would naturally or reasonably follow from the lessor's breach, and were reasonably within the minds of the parties at the time the lease was executed; and where the gist of the action is the deprivation, in whole or in part, of the benefits of the lease, in the absence of any special circumstances brought home to the knowledge of the lessor, generally the tenant is entitled, as the measure of his damages, to the difference between the rental value of the premises for the term, in the condition as contracted to be, and the value in their actual condition, having regard in proper instances for the particular use for which the tenant contracted.

6. Landlord and Tenant—Lease—Breach of Covenant—Damages—Duty of Lessee—Instructions.

While the lessee may recover such special or general damages, upon the breach by the lessor of his covenants of lease, when specifically set forth and proven, as are directly and necessarily occasioned by the lessor's wrongful act or default, and which were reasonably within the minds of the parties at the time of making the contract of lease, it is incumbent on the lessee, by the exercise of reasonable effort and care, to prevent such damages, and to the extent that he could reasonably have done so, he will not be permitted to recover; and where the evidence in the lessee's action for damages presents these principles, a charge, in general terms, that the plaintiff was entitled to a reasonable compensation, subject to the duty the law imposed upon him to mitigate the loss, is too indefinite, and constitutes reversible error.

APPEAL by defendant from *Harding, J.*, at June Term, 1921, of BUNCOMBE.

Civil action to recover damages for an alleged breach of covenant in a rental contract.

On 1 July, 1919, plaintiff leased from the defendant, for a period of one year, a certain store room, known as the Swannanoa-Berkley Barber Shop, located on Biltmore Avenue in the city of Asheville, N. C. The rent was to be paid in monthly installments of $40 each. Plaintiff alleges that, in addition to the premises and fixtures, defendant agreed to furnish "hot and cold water" sufficient for the successful carrying on of his business. This latter covenant is denied by the defendant; and, upon issues joined and counterclaim set up by defendant, the jury returned the following verdict:

"1. Did the plaintiff and defendant enter into the contract, as alleged in the complaint? Answer: 'Yes.'

"2. Did the defendant breach said contract? Answer: 'Yes.'

"3. What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: '$150.'

"4. Did the plaintiff breach said contract, as alleged in the answer? Answer: 'No.'

"5. What amount, if any, is the defendant entitled to recover of the plaintiff? Answer: 'Nothing.'"

Judgment on the verdict in favor of plaintiff, from which the defendant appealed.

No counsel for plaintiff.

Bourne, Parker & Jones and Theo. F. Davidson for defendant.

STACY, J. The plaintiff leased from the defendant for a period of one year a certain store room in the city of Asheville, N. C., to be used as a barber shop. In the written lease the demised premises are described as the "Swannanoa-Berkley Barber Shop, including the fixtures, hot and cold water." Plaintiff contends that this description constituted a covenant on the part of the defendant to furnish him hot water suitable for his business. Defendant denies this contention, and, moreover, insists that at the time the lease was executed he called the plaintiff to his office and, in the presence of defendant's son, explained that he could only agree to furnish plaintiff such hot water as came from the hotel boiler, and that he would not execute the lease except upon that understanding; but further says that there was a jack or urn in the basement of the barber shop which plaintiff could use to increase the temperature of the water if necessary, and that plaintiff agreed to accept the lease upon these terms.

The present action is for damages for breach of what is claimed to be a covenant to furnish hot water. Defendant counterclaimed for loss of rent, the lease being for a year and plaintiff having vacated the premises after the lapse of two months. The jury answered all the issues in favor of the plaintiff, and from the judgment rendered thereon the defendant has appealed.

The assignments of error, upon which the defendant chiefly relies, are those relating to the admission of evidence tending to show loss of prospective profits and the measure of damages. Defendant contends that his Honor permitted the jury to consider supposed future losses and to award speculative damages in violation of the rule stated in *Sprout v. Ward,* 181 N. C., 372; *Coles v. Lumber Co.,* 150 N. C., 183; *Machine Co. v. Tobacco Co.,* 141 N. C., 289, and other cases to like import. Upon this phase of the case the court charged the jury as follows: "Now, gentlemen of the jury, you can take into consideration the condition of his business at the time he quit, the value of it, and the contract, and if the evidence has satisfied you by its greater weight that the failure of the defendant to furnish hot water brought about the breach of the contract, then you would have to consider the reasonable compensation to the plaintiff for the breach of the contract, the destruction of his business, and you will write as your answer to that issue what is a reasonable compensation."

It will be observed that the issues do not establish "the destruction of his business," as a result of defendant's breach of the contract, for which the plaintiff has been permitted to recover under his Honor's charge. It is true a verdict may be given significance and correctly interpreted by reference to the pleadings, the evidence, admissions of the parties and the charge of the court (*Kannan v. Assad,* 182 N. C., 77); but there is no sufficient finding here that the plaintiff was prevented from having the contemplated use and enjoyment of the premises by reason of the defendant's failure to furnish hot and cold water. *Filkin v. Steele,* 124 Iowa, 742; *Bass v. Rollins,* 63 Minn., 226. In answer to the second issue (note wording of issue), the jury has said that the defendant breached his contract; but this, we apprehend, and no more, in the absence of such a right reserved in the lease, would not justify the plaintiff in abandoning the premises and suing for damages, without first putting the lessor in default by affording him a reasonable opportunity, after notice, to comply with the terms of his agreement. *Green v. Redding,* 92 Cal., 548. The case is unlike *McMahan v. Miller,* 82 N. C., 318, where the tenant was driven from the demised premises by the landlord, or by his refusal to comply with his contract under such circumstances as made it impossible or impracticable for the tenant to remain.

In *Lewis v. Chisholm,* 68 Ga., 40, it was held that where a landlord covenants to keep the demised premises in repair and fails to do so to the extent merely of diminishing the value of the use of the premises, and not to rendering them untenable, would not work a forfeiture of the rent, as upon a constructive eviction; for, in the language of the syllabus of the reported case: "The remedy of the tenant is, after reasonable opportunity to the landlord, and failure by him to repair, to make the repairs himself and look to the landlord for reimbursement, or to occupy the premises without repair, and hold the landlord responsible for damages by action or by recoupment to an action for the rent."

True, it has been held in a number of cases that on the breach of the landlord's covenant to furnish necessary accessories, supplies, and equipment, as stipulated in the lease, the tenant may abandon the premises and sue for damages, if by reason of such breach and continued neglect they become unfit for his purposes; and this without further liability for rent on his part. *Bissell v. Lloyd,* 100 Ill., 214; *Sheary v. Adams,* 25 N. Y., 181; *Pres v. Otterstatter,* 85 Pa. St., 534; 3 Southerland on Damages (3 ed.), p. 2611. But we shall not now undertake to formulate any general statement as to what degree of dereliction or default on the part of the landlord, in the absence of any pertinent and controlling stipulation in the lease, will absolve the tenant from his obligation to pay the rent, subsequently accruing under his contract, and thus warrant him in forsaking the premises and suing for damages; for this, we perceive, is a question which must be determined by the facts and circumstances of each particular case. Ordinarily, however, it may be said that a contract is considered to remain in force until it is rescinded by mutual consent, or until the opposite party does some act, inconsistent with the duty imposed upon him by the contract, which amounts to an abandonment of it on his part. *Dula v. Cowles,* 52 N. C., 293; *Hutchins v. Hodges,* 98 N. C., 405.

In *Westerman v. Fiber Co.,* 162 N. C., 297, *Hoke, J.,* observed, "It is not every breach of contract that will operate as a discharge and justify an entire refusal to perform further," and, speaking generally to the subject, quoted with approval the following from Anson's Law of Contract, p. 356: "But though every breach of the contractual obligation confers a right of action upon the injured party, it is not every breach that relieves him from doing what he has undertaken to do. The contract may be broken wholly or in part, and if in part, the breach may not be sufficiently important to operate as a discharge, or, if it be so, the injured party may choose not to regard it as a breach, but may continue to carry out the contract, reserving to himself the right to bring action for such damages as he may have sustained." See, also, *Willis v. Branch,* 94 N. C., 142.

In the instant case plaintiff was permitted to answer, over objection, a number of questions in regard to what he thought he could have made from his barber shop, during the continuance of the term, and what probable losses he sustained in his business by reason of his failure to obtain a sufficient quantity of hot water. We think this evidence should have been excluded. *Fleming v. Peck,* 48 Pa. St., 309.

While anticipated profits may be recovered in those cases where there is a certain standard or fixed method by which they may be estimated and determined with a fair degree of accuracy, yet the courts are well-nigh unanimous in holding that where such profits are of an uncertain, contingent, and speculative character, they are not to be allowed in compensation for the injury. *Machine Co. v. Tobacco Co., supra,* and cases there cited. In some cases profits are the best possible measure of the damages sustained by the injured party, for the very reason that the loss is indisputable, and the amount can be estimated with almost absolute certainty. The case of a contract for the delivery of cotton or any other article, which at all times finds a ready sale at a current market price, is an apt illustration. If such a contract be not performed, the purchaser may recover the advance beyond the purchase price; and this, though not recovered under the name of profits, is really nothing else. "It often happens, also, that one contract, the performance of which will result in certain and definite profits, will be dependent upon the performance of another; and if the second contract is broken, the loss of definite and fixed profits under the other is a necessary and immediate consequence. There is no difficulty in saying in some such cases that profits lost are the proper measure of damages." *Allis v. McLean,* 12 N. W., 642.

But the profits of running a barber shop are too uncertain, doubtful, and speculative to be capable of definite ascertainment. They depended upon many circumstances, among which are skill, ability to attract and hold patronage, the character of competition of others in the same business, and many other contingencies. One man may fail while another prospers; and the same man may fail at one time and prosper at another, though the prospective outlook may seem equally favorable at both times. If damages for breach of contract, like the one in the case at bar, were to be determined on estimates of probable profits, no landlord could know in advance the extent of his liability. It is, therefore, very properly held, in cases like the present, that the lessee, complaining of a breach of a covenant in his lease, must point out elements of damage more certain and more directly traceable to the injury than loss of prospective profits from his business.

Damages for loss of probable and uncertain profits of business, in which the lessee may be engaged on the demised premises, are too remote and speculative to be recovered in an action on a covenant in the lease. *Cleveland, etc., R. Co. v. Mitchell,* 84 Ill. App., 206; 24 Cyc., 922.

Ordinarily the amount of loss which a party to a contract would naturally and probably suffer from its nonperformance, and which was reasonably within the minds of the parties at the time of its making, is the measure of damages for the breach of said contract. But speaking more directly to the test as applied to cases like the one at bar, where the gist of the action is the deprivation, in whole or in part, of the benefit of a lease, in the absence of any special circumstance brought home to the knowledge of the lessor, the general statement of the rule is that the tenant is entitled, as the measure of his damages, to the difference between the rental value of the premises for the term, in the condition as contracted to be, and the rental value in their actual condition. *Kellogg v. Malick,* 125 Wis., 239; *Alexander v. Bishop,* 59 Iowa, 572. And if the contract be made for a particular use by the lessee, the rental value for that use will be the standard by which damages may be awarded. 3 Southerland on Damages (3 ed.), 872; *Bien v. Hess,* 102 Fed., 436.

In 24 Cyc., 922, the author deduces the following statement of the law from numerous decisions on the subject now in hand: "The measure of the lessee's damages for the breach of a covenant in a lease is usually the difference between the market rental value of the premises and the rent agreed to be paid for the same. The lessee is likewise entitled to recover such damages as result as an immediate consequence of the breach, such as injury to crops, goods, machinery, furniture, etc., together with any necessary expenditure of time or money. Damages for loss of probable profits of business in which the lessee may be engaged on the leased premises are too remote and speculative to be recovered in an action on a covenant in a lease." The first sentence in this quotation is supported by what is said in a number of cases, and, as a general rule, it may be taken to be true and accepted as correct—the stipulated rent, in the absence of other evidence, being regarded as the fair rental value of the demised premises in the condition as called for in the lease. But, where the tenant has obtained an advantageous contract, and the reserved rent is less than the real rental value of the premises, he ought not to be deprived of his bargain. To hold otherwise would be to offer an inducement to the lessor, in such a case, to repudiate his obligation. On the other hand, if the landlord has made a good bargain and leased the premises for more than their real rental value, he should not be denied the benefits thus accruing to him under his contract. A contrary holding would amount to awarding the tenant in such a case more than compensatory damages. In other words, under this measure the lessee would be penalized if he made a good bargain and rewarded too much if he made a bad one. *Guano Co. v. Livestock Co.,* 168 N. C., 450, and cases there cited. However, as a practical question, in most cases, in the absence of evidence showing the facts to be otherwise, the two statements would accomplish substantially the same result. Hence, the distinction here pointed out, in the ordinary case, may prove to be more theoretical than real. Nevertheless, we have undertaken to state the rule correctly; for in the absence of any mistake, fraud, or oppression, the courts, as such, are not interested in the wisdom or impolicy of contracts and agreements voluntarily entered into between parties *compos mentis* and *sui juris.* *Burch v. Bush,* 181 N. C., 128.

By rental value is meant, not the conjectural or even probable profits which might accrue to the plaintiff from his business, but the fair value, to be ascertained by proof of what the premises would rent for in the open market, or by evidence of other facts from which the fair rental value of the premises may be determined. *Herpolsheimer v. Christopher* (Neb.), 9 L. R. A. (N. S.), 1127.

The plaintiff may also recover such special damages, when specifically set forth and proven, as have been directly and necessarily occasioned by the defendant's wrongful act or default, and which were reasonably within the minds of the parties at the time of the making of the contract. *Sloan v. Hart,* 150 N. C., 269, and cases there cited. *Adair v. Bogle,* 20 Iowa, 238; *Trull v. Granger,* 8 N. Y., 115; *Gilley v. Hawkins,* 48 Ill., 308. But if the plaintiff, by the exercise of reasonable effort and care on his part, could have prevented such damages, both general and special, it was his duty to do so; and so far as he could have thus prevented them, he will not be permitted to recover therefor. *Robrecht v. Marling,* 29 W. Va., 772.

The defendant was entitled to have the jury instructed on the issue of damages substantially as requested. "Some measure of damages should have been given to the jury for their guidance," and it was not sufficient, under the facts of the instant case, to instruct them that in the event they came to answer the third issue, to allow the plaintiff "a reasonable compensation," subject to the duty which the law imposed upon him of using reasonable efforts to mitigate the loss. *Cherry v. Upton,* 180 N. C., 4.

The line which divides direct and proximate from remote and consequential damages is sometimes shadowy and difficult to trace. Indeed, courts and juries are often perplexed in determining, in certain cases, whether a given loss falls within or beyond the boundary line which separates recoverable from nonrecoverable damages; and in many cases, notwithstanding the general rules laid down for the admeasurement of damages, much must still be left to the good judgment and common sense of the jury. No better system has been devised for the settlement of disputes than a trial by jury, and this right is vouchsafed and preserved to us in the fundamental law of the land. It is seldom that twelve minds, guided by correct legal instructions, will agree upon an unrighteous conclusion. But certain rules, founded in reason and sound principle, have been established for the trial of causes, like the present, and it was error for his Honor not to have given them to the jury in response to the defendant's prayer.

For the errors, as indicated, there must be another trial, and it is so ordered.

New trial.

C. O. THOMPSON v. SCOTT DILLINGHAM AND SCOTT DILLINGHAM, INC.

(Filed 24 May, 1922.)

1. **Pleadings—Debt—Judgment—Default Final.**

   A complaint alleging a money demand for a sum certain with an express promise to pay is sufficient to sustain a judgment by default final for the want of an answer. C. S., 595.

2. **Same—Clerks of Court—Statutes—Constitutional Law.**

   C. S., 573, authorizing a judgment by default final for the want of an answer before the clerk of the court is not an unconstitutional interference with the jurisdiction of the judge of the court, the clerk being a component part of the Superior Court, and the exercise of the power of the judge being recognized and preserved by the right of appeal.

3. **Attachment—Bonds—Principal and Surety—Statutes.**

   Where judgment by default final has been rendered against the principal debtor and the surety on an attachment bond given in the action, in the form required by the statute, C. S., 815, to secure whatever judgment may be rendered, and the property attached has accordingly been retained by the debtor, the surety is concluded from asserting the insufficiency of the bond in not having another surety thereon, as the statute required, when the bond was given and accepted as he had intended, and he had not excepted thereto.

4. **Judgments—Motion to Set Aside—Proof—Attachment—Principal and Surety.**

   Where an attachment bond has been given and acted upon in an action for debt, and judgment by default final has been entered against the principal and his surety, the surety proceeding alone to set aside the judgment must show, by his evidence or in some recognized way outside of the averments of his own unsworn statement, the ground upon which he relies, or his motion will be denied.

5. **Attachment—Principal and Surety—Bankruptcy—Receivers—Title—Liens.**

   Where a judgment by default final has been entered in an action against the same person, individually and as incorporated, for the same debt, and the corporation has been adjudicated a bankrupt within the four-months period, and after the judgment the property of the individual has been placed in the hands of a receiver by the State court, the surety on the attachment bond will remain bound in the jurisdiction of the State court, notwithstanding the adjudication in bankruptcy, for the receiver takes title to the individual property subject to the existent lien by attachment, and the judgment upholding it.

6. Judgments—Interest of Court—Voidable Judgments—Waiver—Clerks of Court—Principal and Surety—Surety's Motion to Set Aside.

A judgment by default final entered by the clerk of the court is not void because of interest, but voidable only, not being in violation of a statute bearing directly on the question, and objection on that ground may be waived by the parties; and while the judgment stands unassailed and unexcepted to by the principal defendants, or by any other directly representing them, it is not open for a surety on an attachment bond given in the case to maintain an objection for his own benefit, and he must conform to his obligation according to its tenor. *Connelly v. White*, 105 N. C., 65, cited and distinguished.

APPEAL by defendant surety from *Bond, J.*, at October Term, 1921, of BUNCOMBE.

Civil action, heard on appeal from judgment of clerk. The action is instituted by plaintiff, returnable to July Term, 1921, against Scott Dillingham as an individual and Scott Dillingham, Incorporated, to recover the sum of $2,000 due upon the purchase price of an automobile sold to defendants, and which sum defendants expressly promised to pay plaintiff. There was an attachment issued in the cause, which was duly levied on property of defendants, and defendants gave bond in the cause with J. L. Page as surety, to the effect that said defendants and surety would pay any and all sums that plaintiff should recover in the action, and thereupon the said attachment was dissolved and the property attached was redelivered to the defendants. It further appeared that the summons in the cause was issued on 1 July, 1921, returnable 15 July, and that a verified complaint was duly filed at the time of issuing the summons, and at time for answering same, 1 August, defendants not being ready, time was extended to 5 October, and defendant still having failed to answer and complaint verified, as stated, showing money demand for sum certain, judgment by default was rendered against defendants and J. L. Page for the amount of the demand, etc., the appeal being taken. That on 6 October, the said surety moved before the clerk to set aside said judgment and to dismiss the action for that defendants Scott Dillingham, Inc., had been adjudged a bankrupt, and said case in bankruptcy was now pending in the U. S. District Court, and for that Jonathan H. Cathey had been appointed receiver against Scott Dillingham, the individual, in an action in the State Superior Court, motion was overruled and on appeal taken the judgment was affirmed in the Superior Court, as stated. Defendant, the surety, excepted, and appealed, assigning errors.

W. P. Brown for plaintiff.
Jones, Williams & Jones for defendant.

HOKE, J. It is objected to the validity of this judgment in denial of appellant's motion: that the complaint does not set out a cause of action in which judgment by default final can be entered, but the objection is without merit. The complaint being on a moneyed demand for a sum certain, with an express promise to pay the same, and so coming within the direct provisions of the statute on the subject. *Bostwick v. R. R.,* 179 N. C., 485; C. S., 595. Nor can the exception be sustained that the act authorizing judgment by default final before the clerk is unconstitutional, C. S., 593, in that it ignores the constitutional principle that the judges of the Superior Court must act in these matters, citing for the position the decision of *Rhyne v. Lipscombe,* 122 N. C., 650. In that case it was held that the Superior Court could not be deprived of the jurisdiction possessed by it at the time of the adoption of the Constitution, and fully recognized by that instrument as having general supervisory power over inferior tribunals of the State; and, therefore, an act of the Legislature which provided for an appeal from an inferior court direct to the Supreme Court, in entire disregard of the recognized powers of the Superior Court, was unconstitutional, but the act in question here does not come within the inhibition of any such principle. For the reason, in the first place, that in matters of this kind the clerk is a component part of the Superior Court as pointed out in *Brittain v. Mull,* 91 N. C., 498, and other like cases. Second, because the power of the judge as presiding officer of the Superior Court is fully recognized and preserved by the right of appeal to him in all such cases by express provisions of the law. C. S., 593. Appellant excepts further that the attachment bond signed by him having only one surety is not a statutory bond, and no judgment, therefore, can be had thereon without suit. It is not contended in support of this position that the bond was to be signed by any other surety, or that the same is otherwise than intended by the parties. It is given in form as the statute requires, not for the forthcoming of the property, but for the payment of the judgment that is recovered in the action, C. S., 815, and while plaintiff could have excepted to the sufficiency of the instrument because executed by only one surety, this was not done, but the bond was given and received without objection as a statutory bond, and the attachment having been dissolved and the property delivered to defendants of record by reason of same, the appellant is concluded and may not now maintain the position that a judgment *in personam* on the bond is improper. *Moffitt v. Garrett,* 23 Okl., 398; *Riddle v. Baker,* 13 Cal., 295; *Pico v. Webster,* 14 Cal., 202; *McLean v. Wright,* 137 Ala., 644; *Bunneman v. Wagner,* 16 Oregon, 433;

Fidelity Co. v. Bowen, 123 Iowa, 356. Again, it is contended that the judgment is invalid because of the fact that (*a*) within four months from the institution of the action Scott Dillingham, Inc., has been adjudged a bankrupt and the proceedings in said case are still pending; (*b*) within four months from commencement of the action the clerk of the court, Jonathan H. Cathey, in same suit in the State court was appointed receiver of the property of Scott Dillingham, the individual. It may suffice to say, in answer to this objection, that neither of the facts suggested in the objections are pleaded or in any way established in the proceedings, nor do we find any evidence offered in support of them except that they are stated by appellant as a part of his motion. This being true, we find no authority to sustain a motion to set aside a final judgment at the instance of the surety, the only appellant in the cause, when neither of the principal defendants are making any objection and neither the trustee in bankruptcy nor the receiver in the State court are even parties in the cause, and if it were otherwise, the bankruptcy proceedings, avoiding liens acquired within four months, only extends to the affairs of the corporation. In the proceedings in the State court the title of the receiver only takes its rise from the date of the appointment. *Hardware Co. v. Holt,* 173 N. C., 308; C. S., secs. 860, 1210.

There is nothing, therefore, in the State proceedings referred to that impairs or threatens the prior lien of plaintiff's attachment, and the judgment being against both defendants, the surety's obligation holds as to the liability of Scott Dillingham, the individual, and the judgment against appellant, therefore, should in no event be disturbed. 2 R. C. L., title Attachment, sec. 82, citing, among other cases, *Pelzer Mfg. Co. v. Pitts,* 76 S. C., 349. It is contended finally that as Cathey, the clerk, is both trustee in bankruptcy of the corporation and receiver under State proceedings of Scott Dillingham, the individual, he has such an interest in the subject-matter of the suit as disqualifies him from hearing the matter or entering any judgment therein. As we have heretofore shown, these facts are nowhere shown in the record, except as they are suggested by him as the basis for appellant's motion. Defendants do not set up such facts in their pleadings, and neither the alleged trustee in bankruptcy nor the receiver are parties to the record, nor have they applied to become such. Apart from this, even if it be conceded that the clerk who entered the judgment was such trustee and receiver, and as such had a pecuniary interest in the subject-matter of the suit, a judgment entered by him is not void unless in violation of some statute bearing directly on the question, it is only voidable, and can be and frequently is waived by the parties. *Moses v. Julian,* 45 N. H., 52, reported also in 84 American Dec., p. 114, with a helpful and informing note on the subject.

This being true, while the judgment stands unassailed and unexcepted to by the principal defendants, or any other directly representing them, it is not open to the surety on the attachment bond to maintain an objection for his own benefit. As to any and all such objections, while the judgment stands as to the principal debtors, the surety is concluded and must conform to his obligation according to its tenor. 2 R. C. L., title Attachment, secs. 101 and 106, and authorities cited. It may be well to note that in *White v. Connelly,* 105 N. C., 65, and other like decisions in this State, where the action of a judicial officer was held to be void there was a statute containing express provisions which disqualified the officer in the case as presented.

We find no error in the record, and judgment denying appellant's motion is

Affirmed.

I. A. DAVENPORT ET AL. v. THE BOARD OF EDUCATION OF McDOWELL COUNTY.

(Filed 24 May, 1922.)

1. **School Districts—Discretion of Board—Courts—Injunction.**

The courts will not interfere with the control and supervision of the county board of education in the exercise of its statutory discretion given in the formation of school districts and their consolidation, or intervene in behalf of any one who supposes himself to be aggrieved by their action therein, except upon a clear showing that it was acting contrary to law, and then they will only restrain its action to the extent necessary to keep it within the law and the rightful exercise of its powers.

2. **Same—Combination of Districts—Location of Schoolhouses.**

A schoolhouse in a special school tax district of a county having been burned, the county school board consolidated this with another such special district, made provisions for the lower grades in the first district, and arranged for the attendance of the higher grades at the schoolhouse in the district with which it had been consolidated; and the taxpayers of the first district sought in their suit to enjoin the action of the county board upon the ground of inconvenience, etc., of the higher grade of children attending the school in the enlarged district. It appearing that the tax rates of the two districts were the same, and that the board was in the exercise of its legal right in making the consolidation, *it is held* that the county board was in the lawful exercise of its discretion given them by the statute, and the courts will not therewith interfere.

3. **Same—Appeal and Error—Presumptions—Findings of Fact—Record.**

Where the judge of the Superior Court has refused to grant an injunction against the exercise of the statutory discretion of a county board of education in consolidating two special tax school districts within the county, arranging for the attendance at various schoolhouses for the lower and upper grades of the children of the district, but has found no facts upon which he has based his rulings, his action will be presumed as correct on appeal, it being for the appellant to show error, and on appeal the Supreme Court will assume that he has based his conclusions of law upon affidavits and other evidence appearing of record that fully support them.

APPEAL by plaintiff from *Lane, J.*, dissolving a temporary restraining order, March, 1922, from MCDOWELL.

This action was brought by the plaintiffs, as taxpayers of Carlysle Special School Tax District in said county, and inhabitants of said district whose children are entitled to school facilities therein, against the defendant to enjoin the unlawful diversion or misapplication of funds raised by taxation in the district for school purposes, to the support of a high school in Nebo District, adjoining Carlysle District, and to require that they be used only for the schools in the latter district. The defendants deny that the funds are being thus unlawfully diverted and misused, and allege that they have in all respects performed their duties as the county board of education within the law, and have committed no unauthorized act in respect to the matters alleged in the complaint. That the schoolhouse in Carlysle District was burned several years ago, and that the defendants have made proper and adequate provision for teaching the children therein temporarily in the primary grades, and have further provided for educational advantages at the high school in Nebo District, the two districts, Nebo and Carlysle, having been legally consolidated by order of the board. The scope of the defense set up by the board of education to the allegations of the plaintiff appears in two affidavits filed by it in support of its denial of said allegations and the other matters averred in the answer, as follows:

"T. W. Stacy, being duly sworn, deposes and says that he is chairman of the board of education of McDowell County; that prior to the consolidation of the Carlysle and Nebo districts, both districts had voted a special tax of 30 cents on the property and 90 cents on the poll; that prior to said consolidation, the Nebo District had built a strong and efficient school, and had maintained same with many capable teachers; that the Nebo school had been known all over McDowell County for the splendid educational work done, it having sent out not only to McDowell County, but to many parts of the State, some of the best equipped teachers that the State has, and that since said consolidation there has been erected at a cost of more than $13,000 an excellent brick school building in said consolidated district, and that a splendid school is now being maintained in said consolidated district. That when said consolidation was made, and prior thereto, the board of education of McDowell County made a thorough investigation and came to the unanimous conclusion that the best interests of the children of the consolidated district would be conserved by such consolidation; that this affiant, representing the board of education of McDowell County prior to the institution of this suit, had consulted many of the patrons of the old Carlysle District with the view of ascertaining their wishes and the advisability of rebuilding a schoolhouse somewhere near the site of the old one which had been burned, as referred to in the affidavit of Prof. N. F. Steppe, and it had been decided by the board of education to erect a new schoolhouse for the primary grades in the old Carlysle District and have the more advanced pupils in said section to attend the well equipped school at Nebo, and in pursuance of this purpose, the board of education is now preparing to erect said schoolhouse; that all this affiant has done in the consolidation of said school districts has been done for the best interests of the children of said school districts, and that he has acted in good faith, and for no other purpose than to promote the best interests of all the children of said districts; that this affiant knows that the entire school board has acted in good faith and with the single and sole purpose of doing what was best to promote the education of all the children of said school districts, since said districts were consolidated into the Nebo District. Wherefore, this affiant prays the court will dissolve the injunction heretofore issued and permit the defendant to proceed to administer their school interests to the best advantage of the children of said consolidated district. (Signed) T. W. STACY."

"N. F. Steppe, first being duly sworn, deposes and says that he is superintendent of the schools of McDowell County; that as such superintendent he advised the consolidation of the two special tax districts of Nebo and Carlysle; that on 1 August, 1920, the board of education of McDowell County duly passed an order in regular session consolidating said district, a copy of which order is set out in the answer in this case; that it is the policy of the educational interests of North Carolina to create large and strong districts in order to provide the best and most efficient schools possible. That said consolidation was made in good faith, and that the board of education has contemplated transporting children of the Carlysle District to the Nebo, or building a new schoolhouse near where the former schoolhouse was burned, in order that the primary grades may be instructed in a one-teacher school, and that the advanced grades may be given instruction at Nebo; that two years after the fire burned Carlysle schoolhouse, a school was taught in said district in a house procured for that purpose; that in this way the children of the Carlysle District would be given a better opportunity for education than to maintain only one-teacher school in said district; that this affiant is advised that the board of education was acting within their powers in consolidating the said two districts; that he acted in good faith in advising and recommending said consolidation, and only had the interests of the school children of said consolidated territory in mind. That before said consolidation was made, this affiant, together with the chairman of the board of education, looked over the field and reported to the full board of education and the matters were discussed, and it was unanimously decided that it was to the best interest of all the children of both districts, Nebo and Carlysle, to consolidate said two special tax districts; that prior to the time of the consolidation, as aforesaid, there had been a school maintained in the Carlysle District, but a few years ago a forest fire broke out on the Carolina, Clinchfield and Ohio Railroad and spread to said district, and destroyed said schoolhouse, and since that time and prior to the bringing of this suit the chairman of the board of education of McDowell County and this affiant have considered with many of the patrons of said district the building of a schoolhouse for the purpose of teaching the primary grades in said district; that a large number of the patrons of said district have petitioned the board of education of McDowell County to erect said school, which petition is hereto attached, and asked to be made a part of this affidavit; that this affiant is advised and believes that the purpose of this suit is to take the special school taxes due the consolidated district from McDowell County and turn it over to the school authorities of Burke County for the purpose of maintaining a school near the McDowell County line. That this affiant is advised that there is no authority for this, and the school authorities of McDowell County do not consent or agree to it, and without consent the same cannot be done; that the school advancement in McDowell County has been phenomenal, and that the citizenship of McDowell County points to the growth of its school interests with great pride; that to grant the prayer of the plaintiffs in this cause would be to hamper and injure the school interests of the consolidated district of Nebo and Carlysle. He further says that this suit was not instituted by the plaintiffs until this affiant had selected a place or site on which to build a schoolhouse, in the old Carlysle District, and a contract had been tentatively entered into with the contractor to build the schoolhouse, and plans were adopted for said schoolhouse. Wherefore, this affiant prays the court to dismiss the injunction and permit the school authorities of McDowell County to manage their affairs without further interference.

(Signed) N. F. STEPPE."

There was a suggestion that Carlysle District be consolidated with Oak Grove District in Burke County, but this plan was not perfected, and the action of the McDowell board relating thereto and contemplated was afterwards rescinded.

Plaintiffs allege that the Nebo High School is inaccessible to the children of Carlysle District, being at a great distance therefrom, with a large pond or lake between the two, and that the children of the said district are practically deprived of proper school facilities and advantages, such as the statute provides for them, and that by uniting with Oak Grove District in Burke County, adjoining the Carlysle District, they will receive proper and adequate school privileges. The defendant denies this, and asserts the right to manage its own school affairs in its own way, without any of its school districts being joined with another district in Burke County. Plaintiffs alleged that Carlysle and Nebo districts had different rates of taxation for school purposes, but this is denied by defendant, who alleges that they are the same, as fixed by the vote of the people in the two districts, acting separately, and this is the fact.

A temporary restraining order was granted by Judge Webb, returnable before Judge Lane, who heard the case upon the pleadings and affidavits and refused to continue the injunction and dismissed the action. Plaintiffs excepted and appealed.

Avery & Ervin and Spainhour & Mull for plaintiffs.
No counsel for defendant.

WALKER, J., after stating the case: If the plaintiffs had any equity in their case it was completely and categorically denied in the answer, which denial is fully sustained by the exhibits. We must assume that Judge Lane found such facts as would support his judgment, though there are no special findings set out in the case on appeal. *Bowers v. Lumber Co.,* 152 N. C., 604. While we may review findings of fact in such cases, we will not reverse what are apparently the judge's findings with good and sufficient ground for such action by him, but will adopt his view of the facts unless clearly erroneous, and we are unable to say that such is the case in this record, but, on the contrary, we concur with the judge in this respect, believing that he reached the proper conclusion both as to the facts and the law. The judge evidently found the facts to be in accordance with the denials and averments contained in the answer, and the affidavits filed before him by the defendant, and generally that the board of education of McDowell County had acted strictly within the powers and authority conferred upon it by the school law as contained in the Consolidated Statutes, chapter entitled "Education," and in its several articles, especially article 10. The two districts, Nebo and Carlysle, were consolidated into one, known as the Nebo District, because of advantages to the school children of the higher education provided by the school for advanced pupils situated in that part of the consolidated district, formerly Nebo School Tax District, and they reserved the schools in what was formerly Carlysle District for the primary grades. We would not lightly interfere with the judgment and discretion of the local board in such matters when it does not appear that the same has been illegally exercised or grossly abused, as is the case here. The law has committed the control and supervision, the formation of districts, and their consolidation in given cases, to the local boards, and we do not intervene in behalf of any one who supposes himself to have been aggrieved by their action except upon some clear showing that they are acting contrary to the law, and so far restrain their action only as to keep them within the law and the rightful exercise of their powers.

The gravamen of the complaint here seems to be that the Nebo school is too inconveniently and distantly located, with reference to the children in what was formerly Carlysle District, to be accessible and available to them. But this is one of the matters committed to the sound judgment and discretion of the board of education in the new, or Nebo District. A similar question was presented in *Brodnax v. Groom*, 64 N. C., 244, as to taxation and the building of bridges, and the Court said in regard to it: "But the power to tax is assumed, and an attempt is made to restrain its exercise, 'except for the necessary expenses of the county.' Who is to decide what are the necessary expenses of a county? The county commissioners, to whom are confided the trust of regulating all county matters. 'Repairing and building bridges' is a part of the necessary expenses of a county as much so as keeping the roads in order, or making new roads; so the case before us is within the power of the county commissioners. How can this Court undertake to control its exercise? Can we say such a bridge does not need repairs; or that in building a new bridge near the site of the old bridge it should be erected as heretofore, upon posts, so as to be cheap, but warranted to last for some years; or that it is better policy to locate it a mile or so above, where the banks are good abutments, and to have stone pillars, at a heavier outlay at the start, but such as will insure permanence and be cheaper in the long run? In short, this Court is not capable of controlling the exercise of power on the part of the General Assembly, or of the county authorities, and it cannot assume to do so, without putting itself in antagonism as well to the General Assembly as to the county authorities, and erecting a despotism of five men; which is opposed to the fundamental principles of our Government, and the usages of all times past. For the exercise of powers conferred by the Constitution, the people must rely upon the honesty of the members of the General Assembly, and of the persons elected to fill places of trust in the several counties. This Court has no power, and is not capable if it had the power, of controlling the exercise of power conferred by the Constitution, upon the legislative department of the Government, or upon the county authorities." Matters of this kind must be left largely to the good judgment and discretion of the local authorities, who know far better than we do what will best promote the interests of those who have confided the trust to them, and to whom they are responsible for its just and proper performance.

In *Smith v. School Trustees,* 141 N. C., 143, relied on by the defendant for the position that the courts will enjoin local authorities in the exercise of their powers, it appears that the wrong imputed to the defendants in that case was a distinct and direct violation of the law, and even of the Constitution, in the management and disposition of school funds. They were not exercising merely a lawful discretion, but were acting unlawfully and in the application and disbursement of school funds, and contrary to a former decision of this Court. *Lowery v. School Trustees,* 140 N. C., 33.

We should not interfere with the exercise of powers by the local school authorities, charged with the duty of providing the necessary facilities for the education of the children of the State in their respective communities, unless the legal right of some one, who asks for relief, is being clearly violated. It does not so appear in this case, but the contrary.

The power and authority of the local school boards are adapted to the full and proper performance of the duties imposed upon them, and have recently been somewhat enlarged and simplified, and made more flexible (Laws of 1921, ch. 179), and we should be careful not unduly to restrict these powers, the full exercise of which is so essential to the efficient conduct and management of our public schools.

Where the schoolhouses shall be placed in the district, and in what manner they shall be conducted, are obviously matters which must be decided by the school authorities, who have done so in this case. They had the right to consolidate the two districts, Carlysle and Nebo, into one district, both districts having the same rate of taxation (*Paschal v. Johnson, ante,* 129 (110 S. E., 841). The McDowell board could not be compelled to consolidate Carlysle District with Oak Grove District, which is in Burke County, and it refused to do so, preferring to administer the affairs of their schools in their own county, rather than have a divided supervision of them. We are without power to reverse their decision in this respect, it not appearing that the board has acted in violation of any law.

Since the argument of this cause, it has been suggested that certain facts exist which, as we think, do not appear in the record, such as the bonded indebtedness of Nebo District and the consolidation of Carlysle District with the district in Burke County. We cannot consider matters not so appearing. We may repeat that the judgment of the court is presumed to be correct, and it is incumbent upon the appellant to show error, if any exists, and whether we act on the presumption or upon the evidence, and our view of the facts based upon the evidence, which agrees with that of the learned judge, we reach same conclusion that there was no error in the judgment of the court as to the injunction. We cannot assume or infer facts to exist, except as they appear clearly in the record.

The case really presents the single question, whether upon the facts as they appear we should undertake to review the action of the board of education of McDowell County, which has done nothing more than exercise its rightful authority under the statute. It is clear that we should decline to do so, in any admissible view of the case.

The decision of the judge as to the continuance of the injunction to the final hearing is in accordance with the facts as they now appear, and the law, as we understand them, but he should not have dismissed the action, as the merits of the action and how it shall be finally determined were not before him, and not before us at this time, plaintiff being entitled to be heard upon the issues raised by the pleadings at the final trial of the case. *Moore v. Monument Co.,* 166 N. C., 212; *R. R. v. Mining Co.,* 117 N. C., 191; *Crawford v. Pearson,* 116 N. C., 718.

The judgment should therefore be modified, as there was no error in refusing to continue the injunction, but there was error in dismissing the action, and, as thus modified, it is affirmed. Costs of this Court equally divided between the parties.

Modified and affirmed.

STACY, J., not sitting.

H. D. BAKER v. CARR LUMBER COMPANY.

(Filed 24 May, 1922.)

1. **Appeal and Error—Parties—Nonsuit—Partnership—Fragmentary Appeal.**

Where the Superior Court judge has ruled upon the trial of the case that certain other parties were necessary for the prosecution of the action on the ground that they had an interest in the subject-matter as partners, and that the cause could not proceed without them, the ruling strikes to the foundation of the plaintiff's cause of action, and he may take a voluntary nonsuit and appeal without valid objection that his appeal should be dismissed as fragmentary.

2. **Same—Railroads—Timber—Right of Way—Contracts—Cutting and Delivering Timber.**

The defendant railway company obtained a right of way through plaintiff's timbered lands, inaccessible to railway transportation, upon part consideration that the defendant would build the road and transport the plaintiff's timber at a certain price per carload. The defendant commenced to build the road and notified the plaintiff to have his timber hauled to the right of way, and the plaintiff then contracted with another to do the cutting and hauling upon consideration of advancements, and a certain part of the proceeds of the sale of the timber, without assigning any of his rights under the contract he had made with the defendant railroad company: *Held*, error for the trial judge to hold that the contractor for the cutting and hauling the timber was a partner in the contract sued on, and this ruling striking to the root of the plaintiff's alleged cause, he was within his right in taking a voluntary nonsuit and appealing from the ruling of the trial court.

APPEAL by plaintiff from *McElroy, J.*, at December Term, 1921, of BUNCOMBE.

This is an action brought to recover damages for a breach of contract. The parties do not differ materially as to the terms of the two contracts involved; and, therefore, the following statement of the material facts will suffice to present fully the point raised by the exception: "On or about 1 October, 1919, plaintiff entered into a contract with the defendant, whereby he agreed to sell defendant a right of way for its railroad through plaintiff's land in Henderson County for the sum of $100 cash and the further consideration that defendant would furnish plaintiff sufficient cars for loading and transporting all his lumber and wood located on said tract of land from any point on said railroad where it passed through plaintiff's land to the junction point of defendant's said railroad with the line of the Southern Railway Company, and to transport said cars of lumber and wood from said points on said land to said junction point of said Southern Railway Company at the price of $10 for each car so transported." The plaintiff complied with his part of the contract, and defendant commenced grading its right of way through plaintiff's land in October, 1919, and at that time defendant notified plaintiff to cut and place his wood and lumber along the right of way, and that the railroad would be in operation and sufficient cars would be furnished plaintiff for loading and transporting his wood and timber by 1 June, 1920. The construction work was abandoned by defendant in the spring of 1920, "and they have done nothing since about laying down the rails." On 2 February, 1920, plaintiff entered into a contract with E. Penland and B. Penland, under which the Penlands were to cut, haul, and deliver to the siding of the railroad all timber, wood, etc., and as compensation were "to have one-half of all proceeds from wood, cross-ties, tan bark, acid wood, dogwood, and hickory." The contract also provided that plaintiff should make certain advancements in money to the Penlands, and that plaintiff should be reimbursed out of their part of the proceeds from sales. The plaintiff built a house and advanced about $800 to the Penlands, and a large amount of wood and timber was cut, hauled, and stacked on defendant's right of way, and the Penlands continued to comply with their contract with plaintiff until it was definitely learned that the railroad would not be built. The wood and timber that was cut and placed at the railroad right of way, and that cut and left in the woods, and the wood still standing, was of little value without a railroad, on account of the cost of transporting and the lack of means of transportation, and plaintiff was thereby greatly damaged.

At the close of all the evidence the court held that E. Penland and B. Penland were partners with plaintiff in the logging contract, and that the Penlands were necessary and indispensable parties in the pending case, involving a breach of another and distinct contract between plaintiff and defendant, "and that in no view of the case could plaintiff recover as an individual, and that the court would charge the jury to that effect. The plaintiff never transferred or assigned any interest in the contract with defendant to either of the Penlands, and there was no evidence that the Penlands ever had any connection with or interest in the contract involved in this action.

Upon the intimation of its opinion by the court, as above set forth, and in deference thereto, and reserving its exception, the plaintiff submitted to a nonsuit and appealed.

W. G. Fortune and Mark W. Brown for plaintiff.
Martin, Rollins & Wright for defendant.

WALKER, J. The plaintiff was not bound to submit absolutely to the judge's ruling, but could except thereto and take a nonsuit, as he did, for he could not have recovered, under the judge's view of the case. It is not a case, therefore, wherein there is ground left upon which plaintiff might have succeeded in his action, the judge's ruling having "cut up his case by the roots." The procedure he adopted was the only one to which he could safely resort and save his rights.

It appears in this case that the two contracts, the one with the defendant and the other with the Penlands, were made at different times, the former having been made on 1 October, 1919, and the latter on 2 February, 1920. On their face they have no legal connection with each other. The contract with the defendant was made for the plaintiff's benefit, and not for that of the Penlands, the contract with them not being in existence at the time the other contract of 1 October, 1919, was made, and there has been no assignment of any interest in the contract by the plaintiff to the Penlands. Even if it be true that the contract of February, 1920, created a partnership between plaintiff and the Penlands, it related only to the particular transactions referred to in the contract.

It is very certain that the defendant Carr Lumber Company did not enter into any such contract, and was not a party thereto, as its contract with the plaintiff related to a separate and distinct matter, and the principles of law applicable to the two contracts are not the same, nor is the same rule of damages applicable to both. The Penlands cannot sue on the contract with the lumber company, for it has made no contract with them. They are not parties or privies to it, nor has the contract, or any part of it, been assigned to them, nor was it made for their benefit. If there has been a breach of it, the damages would go to the plaintiff. The action, therefore, must be confined to the parties named in the contract (*Whitehead v. Reddick*, 34 N. C., 95; *Hardy v. Williams*, 31 N. C., 177), not only because they are the only parties named therein, but because they are also the real parties in interest. We cannot change a contract, so as to give another a right or interest in the contract, which it does not confer, but must enforce it as we find it to be, and as the parties have made it in their agreement. *Norment v. Johnston*, 32 N. C., 89. Referring to that case, *Judge Battle* said in *Joyner v. Pool*, 49 N. C., 293, at p. 295: "The case of *Norment v. Johnston*, 32 N. C., 89, which is the only authority referred to and relied upon by the counsel for the plaintiffs, does not, in our estimation, aid their case. The principle therein decided was that one partner could not by a contract with another person charge what was known to be his individual debt to that person, upon the firm, without the consent of the other members of the firm. Surely that does not prove that an individual party to a contract can convert that contract into one with a firm, without the consent, and to the prejudice, of the other party." A contract is made only by consent or agreement of the parties to it (*Norment v. Johnston*, *supra*), and there is nothing here to take this case out of the rule. "There can be no contract in the true sense, that is, as distinguished from *quasi* or constructive contracts, in the absence of the element of agreement, or mutual assent of the parties. This, above all others, perhaps, is an essential element of every contract." 9 Cyc., 245. The two contracts are therefore separate and distinct, not having the same parties or the same subject-matter. The opinion expressed by the court was not well founded, and was an erroneous view of the case.

The nonsuit is set aside, and a new trial ordered.

New trial.

SARAH A. LYMAN, W. W. LYMAN AND OTHERS, EX PARTE, v. SOUTHERN COAL COMPANY.

(Filed 24 May, 1922.)

1. **Partition—Sales for Division—Commissioners—Contracts of Sale—Purchasers—Wrong Reports—Motion in Cause—Statutes.**

   A commissioner appointed for the sale of land in proceedings for partition, after confirmation of sale to a private purchaser, filed a petition in the cause after notice alleging in effect that in addition to the purchase price he had reported, the purchaser had agreed to pay a larger sum to include his commission, etc., and had paid only the smaller sum, reported and confirmed, and refused to pay the balance as agreed after having received the deed from the clerk's office, where it had been deposited: *Held*, upon demurrer, the allegations of the petition must be considered as true, and it was reversible error for the trial judge to sustain the demurrer, and not require an answer to be filed to set the matters at issue for the purpose of proceeding to determine the controversy. C. S., 621.

2. **Same—Judgments—Imposition on the Courts.**

   Where the commissioner for the private sale of lands for division has withheld from the knowledge of the court the actual price the purchaser has agreed to pay, and reported a lesser sum, which the court has confirmed by final judgment, it is an imposition on the court, and will not conclude it from reopening the case on the petition of the commissioner in the cause, after notice, and affording the proper relief.

3. **Partition—Sales for Division—Commissioners—Commissions—Agreement of Parties—Courts—Reports.**

   The court will not permit the commissioner and parties in interest in proceedings to sell land for division among tenants in common, to fix among themselves without its knowledge the compensation of the commissioner, especially where the interests of minors are involved, and impose upon the court by the commissioner's reporting the purchase price in a net sum after deducting the agreed commissions, it being within the province of the court to allow such commissions as it may deem right and proper, and pass upon the sufficiency of the purchase price of the lands with all the facts before it.

APPEAL by petitioners from *McElroy, J.*, 21 December, 1921, from BUNCOMBE.

This is a petition in the above entitled cause, it being a proceeding before the clerk of the Superior Court for partition, in the following terms:

The petition alleges that William W. Lyman, the father of the petitioner, W. W. Lyman, Jr., owned the land mentioned in the petition since the death of his father, on 13 December, 1893. From that date till W. W. Lyman's death, on 7 February, 1921, he having always been a resident of California, his brother, the petitioner, A. J. Lyman, had looked after his interests in regard to the property, paying the taxes, etc., conducting a large amount of correspondence, etc., for which he had received no compensation. On the death of W. W. Lyman the property descended to the petitioners, W. W. Lyman, Jr., a son, and the petitioners, Theodore B., *et al.*, children of a deceased son, Theodore B. Lyman, subject to the dower of his widow, the petitioner, Sarah A. Lyman. On 15 July, 1921, the petitioners (other than A. J. Lyman), the widow and heirs of W. W. Lyman, filed their petition with the clerk of the Superior Court of Buncombe County for a sale of the property for partition. The petitioner, Sarah A. Lyman, the widow, was over 80 years of age, and the children of Theodore B. Lyman, deceased, were under age, and W. W. Lyman, Jr., who was 36 years of age, was the only one of the owners of said property who was of sufficient business experience to transact business in regard thereto. He and A. J. Lyman conducted the correspondence stated in the petition, from which it appears that W. W. Lyman, Jr., on behalf of himself and his coöwners, agreed to receive net for the property $21,000, and to allow A. J. Lyman, in view of the long period of gratuitous service rendered by him to his brother, as above stated, $2,000 of the $23,500 hereinafter mentioned, A. J. Lyman agreeing not to deduct any part of the $21,000 for his compensation. A. J. Lyman secured the assistance of J. C. Penland, a real estate broker, agreeing to pay Penland $500; and as a result of their coöperation the appellee, the Southern Coal Company, offered by letter to pay $23,500 for the property, "$5,500 to be paid on the delivery of the deed, the remainder of the purchase price to be paid in three equal installments of $6,000 each, evidenced by notes." Thereupon A. J. Lyman, on 23 August, 1921, wrote W. W. Lyman, Jr., advising him that he had "got the coal people up to $23,000" for the lots, and saying that, "In view of my marked success in securing this fine figure, I want you to allow me $2,000 as compensation, which I feel is but fair and just. Had I closed for the $21,000 you would have received less than $20,000." To which W. W. Lyman, Jr., replied, on 14 September, 1921, "We have agreed to accept your figure for the commission. Your proposition is not beyond reason." It will be observed that A. J. Lyman in his letter stated $23,000 as the purchase price, instead of $23,500. The reason for doing this was that he regarded the agreement between him and Penland as to the $500 as personal, and therefore did not think it necessary to go into an explanation of that in his correspondence with W. W. Lyman, Jr. As to the latter, the proposition was correctly stated in A. J. Lyman's letter to him, that is, that the purchase price would be $23,000, out of which the owners, represented by W. W. Lyman, Jr., agreed to pay him $2,000. This $500 the coal company has paid (to Penland), in addition to the $21,000 mentioned in the decree of sale. Thereupon A. J. Lyman reported to the Superior Court that he had received an offer of $21,000 for the property, $3,000 of said $21,000 to be paid in cash, the balance in equal installments of $6,000 each, it being his understanding that the additional $2,500 to be paid by the Southern Coal Company would be paid by it to him, and that he would receive $2,000 of it for himself, pursuant to his agreement to that effect with W. W. Lyman, Jr., and the other $500 he would pay to Penland, not intending, as has heretofore been stated, to ask for any allowance for his services as commissioner out of the $21,000. The clerk, on 23 September, 1921, made a decree authorizing A. J. Lyman, as commissioner, "to sell said lots at private sale for not less than said sum ($21,000) on the terms stated in his report." The Southern Coal Company was not named as the prospective purchaser either in the report of A. J. Lyman, commissioner, or in the decree of sale just mentioned. The decree of sale provided that, "Upon the payment into office of the clerk of this court of the cash payment of $3,000, and the execution by the purchaser of notes for the deferred payments, and a deed in trust in form satisfactory to the commissioner, and said clerk securing the payment of said notes, the commissioner aforesaid is hereby authorized to execute a deed conveying said property to the purchaser in fee simple. And this proceeding is retained for further directions."

A. J. Lyman, as commissioner, then executed a deed, 26 October, 1921, conveying the property to the Southern Coal Company, who paid to the clerk of the court $2,500, and A. J. Lyman also paid to the clerk the $500 which he received from the coal company with its letter of 23 August, 1921, and the coal company deposited with the clerk its notes for $18,000. The manner by which this deed came into the possession of the Southern Coal Company is stated in paragraphs 12, 13, and 14 of the petition, as follows:

"12. It was not the intention of the said A. J. Lyman to deliver the said deed until the Southern Coal Company had paid in cash, in addition to said $500, the further sum of $5,000, $3,000 of which was to be paid to the clerk and the other $2,500 to A. J. Lyman, $500 of the same to be paid to J. C. Penland and $2,000 to himself, as hereinbefore set forth.

"13. That when the said A. J. Lyman tendered the deed to the party who was acting in the matter as attorney for the Southern Coal Company, the latter informed A. J. Lyman that the matter could not be closed because of the absence of Bernard Elias, the secretary of the Southern Coal Company, and suggested that Lyman deposit the deed with the clerk, who would deliver the same to the Southern Coal Company upon its compliance with the said decree.

"14. A. J. Lyman complied with this suggestion, and left the deed with the clerk, and thereafter the Southern Coal Company received the deed from the clerk."

The coal company, having thus secured possession of the deed, refused to pay the additional $2,500—which would make the $5,500 to be paid on the delivery of the deed, according to their agreement—but it did, after thus getting possession of the deed, pay, on 8 November, 1921, $250 to Penland, and later paid Penland an additional $250, but it has refused to pay the additional $2,000 which it is necessary for it to pay in order to comply with its agreement for the payment of "$5,500 to be paid on the delivery of the deed." The owners of the property, in consequence of this refusal on the part of the coal company, on 7 December, 1921, filed their petition in which they set forth the facts and asked the court "to make such order herein as may be according to justice and right, and that the unpaid part, to wit, $2,250, of the $5,500 to be paid on the delivery of the deed be paid as the court may direct by the Southern Coal Company either to A. J. Lyman, or else into the office of the clerk of the court for the benefit of the owners of said real estate; and that said real estate be charged with a lien for the payment thereof, with interest from 26 October, 1921, and be sold by decree of this court if said sum be not paid"; $250 was paid to Penland by the coal company after the filing of this petition.

The agreement between the parties as to the sale and the division of the proceeds was not reported to the court or known to it, and it was kept in ignorance of it.

The Southern Coal Company, by leave of the court, entered a special appearance, and moved to dismiss the petition upon several grounds stated in the written motion.

The clerk allowed the motion, and dismissed the petition, whereupon the petitioners appealed to the court in term, which affirmed the judgment of the clerk, the material part of the judgment being as follows:

"1. That the said A. J. Lyman agreed with the parties who owned the real estate mentioned in the record that he would not ask for any commission for his services as commissioner out of the $21,000 mentioned in the said petition—see paragraphs 9 and 10 thereof—and the entire $21,000 goes to the owners of the real estate mentioned in said petition. Unless the Southern Coal Company is required to pay the additional $2,500, as prayed for in said petition, said A. J. Lyman will get no compensation for his services herein as commissioner. No part of the $3,000 (part of said $21,000) already paid by the Southern Coal Company has been paid to A. J. Lyman, nor has any order been made by the court for the payment of any part thereof to him, and A. J. Lyman does not intend to ask the court to allow him any part of said $21,000, it being understood between him and W. W. Lyman, Jr., the latter acting in behalf of himself and his coöwners of said real estate, as shown by the correspondence set forth in said petition, that none of the $21,000 would be used for the payment to A. J. Lyman of any commission.

"2. That the Southern Coal Company has, since 8 November, 1921, paid to J. C. Penland $250, in addition to the $250 paid by it to said Penland, as stated in paragraph 6 of the petition, herein verified 7 December, 1921.

"Upon consideration of the record, and on the facts therein appearing and herein found, the motion of the Southern Coal Company to dismiss the petition, verified 7 December, 1921, is sustained, and the clerk's order of 20 December, 1921, in that behalf is hereby affirmed."

The petitioners duly excepted and appealed to this Court.

F. W. Thomas for plaintiffs.
J. W. Haynes for defendant.

WALKER, J., after stating the case: There was error in dismissing the proceeding, upon the special appearance. The court should have ordered the money to be paid into court, or to the commissioner appointed to make the sale, unless the petition was answered and the allegations thereof denied, which the respondents may now be allowed by the court to do. When the facts are ascertained in some way, according to the course and practice of the court, the latter may then proceed to declare the rights of the parties and enter judgment accordingly. If the bid for the land at the sale was $23,500, the purchaser was liable for that amount upon a confirmation of the sale, the question of commissions for making the sale being one for the court and not for the parties to determine. The court, speaking of the summary remedy against purchasers at public sales, under the statute (Rev. Code., ch. 31, sec. 129), said in *Ex parte Cotten,* 62 N. C., 81: "The Declaration of Rights provides that in all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the people, and ought to remain sacred and inviolable. What controversy did the petitioner have which he had the right to have determined by a jury? In a proper proceeding for the purpose, the court of equity had ordered the sale of property, and he became the purchaser at a certain price, and promised to pay the amount at a given day. He failed to pay, and the court had the power to attach him for a contempt for not paying. The proceedings of the court could be obstructed without end if, in attempting to enforce its judgments and decrees, the person against whom they are to be enforced could stop the proceedings until he could make up a controversy with the court, and have it tried by a jury. So, in this case, certain persons sought the aid of the court of equity to sell their property; the court ordered the sale, and the petitioner bought, and now seeks to stay the proceedings of the court of equity in that case until another suit can be instituted against him, in which a jury can determine whether he ought to pay. The constitutional provision was certainly never intended to apply to a case like this. As a substitute for an attachment by which a court of equity can enforce all its decrees, a milder remedy is provided in the aforesaid statute, by notice and judgment on motion. And that statute is not unconstitutional." The provision of the Rev. Code, cited above, has been brought forward in the Code (sec. 941), in the Revisal of 1905 (sec. 1524), and in Consolidated Statutes (sec. 621). *Lackey v. Pearson*, 101 N. C., 651, where *Chief Justice Smith* discusses very fully the procedure in such cases, citing *Ex parte Cotten, supra; Lord v. Meroney,* 79 N. C., 14, and other cases. *Hudson v. Coble,* 97 N. C., 260, where the same *Chief Justice* again states the proper practice, citing *Rogers v. Holt,* 62 N. C., 108; *Singletary v. Whitaker, ibid.,* 77; *Ex parte Cotten, supra; Council v. Rivers,* 65 N. C., 54, and he then says: "These cases assert the power of the court of equity, upon petition for the sale of land for the benefit of infants, to compel the purchaser by orders made in the cause to perform specifically his contract of purchase." He further says: "The orderly mode of proceeding was for the court to accept the bid of Coffield and Barnhill, by confirming the contract of sale, and then, upon the matter set out in the report, to enter a rule against them to show cause why they should not be required to comply with the terms of sale." The court then proceeds to suggest, with reference to the correct procedure, that the purchasers may be decreed, (1) to specifically perform their contract; or (2) the land may be ordered to be sold and the purchaser released; or (3) without releasing the purchaser, such second sale may be directed, the purchasers undertaking, as a condition precedent to such order, to pay the additional costs and make good any deficiency produced thereby, citing *Council v. Rivers,* 65 N. C., 54. The Court, in *Hudson v. Coble, supra,* closes with this language: "The form of the present proceedings is essentially equitable, and must involve, when necessary to accomplish its purpose, the exercise of similar powers. It could never have been intended by the Legislature to confer the jurisdiction and leave the court without the means of making it effectual and complete. The application is in the Superior Court, the clerk exercises jurisdiction, and any question of law or fact may be referred to the judge or jury. There is no impediment suggested in the way of the exercise of all the functions pertinent to the case, and to a full and final determination." 24 Cyc., 52 and 53.

But counsel for respondents, while conceding this to be the general rule here and elsewhere, contend that there was a final judgment in this case; and, therefore, the remedy ordinarily available by motion in the pending cause is not open to petitioners. The answer to the position is that even though the judgment was final, the allegations here are that the court was imposed upon, and important knowledge of the facts, as to the amount of the bid at the sale and as to certain transactions relating to it, were withheld from the court, and that it was deceived thereby, and induced to enter a judgment which it would not have rendered if it had possessed proper and requisite information of the facts and circumstances of the sale, which was wrongfully suppressed. Whether this is so or not must be ascertained by the court when an answer is filed, raising material issues. But until this is done, we must assume the facts to be as alleged in the petition, there being no answer, but merely a motion to dismiss the proceeding, which requires us to consider the facts, as alleged, to be established, at least for the present, and for the purpose of deciding upon the motion. This being so, the case is brought directly within the principles stated in *Roberts v. Pratt,* 152 N. C., 731; *Massie v. Hanie,* 165 N. C., 174, and *Moody v. Wike,* 170 N. C., 731. It was held in *Roberts v. Pratt, supra:* "While it is very generally recognized that a final judgment can only be impeached for fraud by means of an independent action, this position does not necessarily prevail when a judgment has been procured by imposition on the court as to the rendition, or where it has been entered contrary to the course and practice of the court. In such case, relief may ordinarily be obtained by motion in the cause, and this procedure, as a rule, is proper and allowable in all cases where courts of the common law would correct their judgments by writs of error *coram nobis* or *coram vobis;* and this is especially true under our present system, combining legal and equitable procedure in one and the same jurisdiction." The question is fully discussed by *Justice Hoke* in the *Roberts case, supra,* and in *Massie v. Hanie, supra,* and further consideration of it we deem to be unnecessary.

If the facts are, as set out in the petition, and upon the motion to dismiss, in the nature of a demurrer, we must so hold, the petitioners have proceeded properly, and are entitled to be heard, and to have the court ascertain the facts by some appropriate procedure, and pass upon the rights of the parties.

We can never lend our approval to a practice by which parties stipulate as to the distribution of the proceeds of a judicial sale, affecting their own interests and for their own benefit, without the full knowledge and consent of the court. The facts must be disclosed in the report and submitted to the court, for its approval in proper cases. There are infants in this case whose rights may be seriously affected and prejudiced by such an agreement, and their interests must be protected. What was done in this particular matter may have been caused by ignorance of the law and of correct legal procedure, but the fact still remains that according to the allegations of the petitioners, the court was deprived of that knowledge of the transaction to which it was entitled, and that it acted, and passed the decree, because of it, or, at least, without being aware of the agreement between the parties, or of any of its terms.

It may be that the facts will appear to be quite different from those alleged by petitioners, but however this may be, they are entitled to relief, and to substantial relief if they are successful in establishing their case.

The judgment will be set aside and further proceedings had in the court below, as indicated.

Reversed.

POOLE & BLUE, INC., v. J. F. THOMPSON ET AL.

(Filed 24 May, 1922.)

1. Wills—Estates—Contingent Remainders—Vesting of Title.

A devise of land to the wife for life, and at her death or remarriage to be equally divided between certain of their children, "provided they have arrived at the age of twenty-one years, or if any of my children have married and died, leaving surviving a child or children, it or they to have that portion which would have fallen to its mother or father had she or he been living": *Held*, the effect of the devise was to pass the property to the wife for life, or until her remarriage, with contingent remainder to their children or the children of such of them as may have died prior to the vesting of the estate which would take effect at the death or remarriage of the wife.

2. Same—Deeds and Conveyances.

This being the nature of the estate or interest, the deed of the wife and their children prior to the time of the vesting of the estate or interests, would not convey a good title; for if a child should die before the vesting of the estate or interests, leaving children, such children would take directly from the testator, and their estate or interest would not pass by the deed.

3. Estates—Contingent Remainders—Statutes—Sales—Proceeds.

It was not the purpose of C. S., 1744, authorizing a sale of land in certain instances whenever there is a vested interest in the same, with a contingent remainder over to persons who are not in being, or when the contingency has not yet happened which will determine whom the remaindermen are, to destroy the interest of the remote contingent remaindermen, but to enable the present owners to sell the property and make a good title to the same, and to require that the proceeds be held as a fund, subject to the claims of persons who may ultimately be entitled thereto, and safeguard their rights in all respects.

4. Same—Actions—Proceedings—Parties—Guardian ad Litem.

Where lands are affected with a contingent interest in remainder, not determinable during the life of the tenant for life, the holder of the vested interest and those in immediate remainder may proceed to have the lands sold under the provisions of C. S., 1744, and have those remotely interested represented by guardian *ad litem* for the protection of their interests; and where it is made to appear that the interest of all parties require, or will be materially enhanced by it, the court may order a sale of the property, or any part thereof, for reinvestment, either in purchasing or improving real estate, etc., or invested temporarily to be held under the same contingencies in like manner as the property ordered to be sold.

5. Same—Private Sales—Public Sales.

Where the sale of land affected with remote contingent interests not ascertainable at the time, comes within the provisions of C. S., 1744, the court having jurisdiction may order the property disposed of either at a public or private sale, when it is shown that, as to the one or the other, the best interests of the parties will be promoted, subject always to the approval of the court.

6. Same—Confirming Invalid Sales—Judgment.

Where the present owners of land for life and in remainder have attempted to convey a fee-simple title to lands affected with remote contingent interests, without resorting to the proceedings allowed by C. S., 1744, which were applicable to the transactions, and thereafter these proceedings are properly brought, having the guardian *ad litem* appointed, as required, and the petition filed sets forth the sale previously made, the entire investment realized and held from the proceeds thereof, and subjects such investments and their ownership and control to the orders and judgment of the court in the cause, and allege and show that the sale was for the full value of the property, highly advantageous to all parties in interest, and that in fact it was necessary owing to liens for taxes, assessments, etc., on the land: *Held*, the court having jurisdiction of the parties and the property may enter a valid judgment confirming and authorizing the sale, and directing that the fund be properly safeguarded and invested, and the remote contingent interests safeguarded as the statute requires.

7. Estates — Contingent Remainders — Statutes— Sales—Bond—Appeal and Error.

In all cases where property affected with unascertainable contingent remainders is ordered sold under the provisions of C. S., 1744, it is now required by the amendatory act of 1919, chapters 17 and 259, that a bond be given to assure the safety of the funds arising from the sale; but where this is omitted from a judgment otherwise regular, it will not affect the title conveyed, though the decree should be modified in that respect by proper steps taken in the Superior Court.

APPEAL by plaintiffs from *Webb, J.*, at December Term, 1921, of GUILFORD.

Civil action, tried on pleadings and the admissions of the parties in the cause, a jury trial having been formally waived. The action is instituted to enforce an agreement entered into between plaintiff and defendants concerning the sale of certain lands by defendants to plaintiff and a restoration of part of the purchase price to plaintiff, and on the hearing it was properly made to appear that B. J. Fisher, formerly of

Asheboro, N. C., died on 15 April, 1903, owning at the time valuable real estate situated in Greensboro, N. C., and also in England, and leaving him surviving as his devisees and heirs at law his widow and their four infant children, Olivia Maude, Elsie May, William Randolph, and Millicent Rosa, and also a daughter in England by a former wife, Lillian Brenda Fisher. That in said will, duly admitted to probate and recorded, said testator disposed of the said real estate, including the property in controversy, as follows:

"2. I give, devise, and bequeath to my daughter, Lillian Brenda Fisher, of Chester House, Wellingboro, Northampton, England, all my property of all kinds and description in Great Britain, in fee simple absolutely.

"3. I give, devise, and bequeath to my beloved wife, Isabella Fisher, all my property on America, both real and personal, to her use and disposal all moneys accruing annually, to use and enjoy the same during her life, if she shall so long continue my widow, and from and after her decease, or second marriage (whichever shall first happen), all her interest in my estate shall cease and be forever lost.

"4. At the death or remarriage of my wife, Isabella Fisher, my will and desire is that all my property in America be divided equally between my children, to wit, Olivia Maude, Elsie May, William Randolph Grover, Millicent Rosa, provided they have arrived at the age of 21 years, or if any of my said children have married and died, leaving surviving a child or children, it or they to have that portion which would have fallen to its mother or father (as the case may be), had he or she been living.

"5. In the event of the death of my wife, as aforesaid, before the children arrive at the age of 21 years, then the whole of my property is to go into the hands of my executor hereinafter named, and he shall collect all moneys and interest, and shall expend them for the use and benefit of my children as aforesaid, who are under the age of 21 years, but shall hand over to those over the age of 21 years that division to which they are entitled of annual interest.

"6. All moneys not applying or necessary to be spent for my children under 21 years to be invested in United States Government securities for all my said children, and when all have arrived at the age of 21, then this general fund and all other properties to be divided between my said children, and by themselves, so that each shall have an equal share of my estate."

That on or about 5 December, 1909, Elsie May Fisher, one of the children above mentioned, died, a minor without issue, or ever having married. That later, in 1914, under the terms of said will and by order of court in a pending cause, the property and the control and management of the same was turned over to Isabella Fisher, administratrix *cum testamento annexo,* and Isabella Fisher individually, and Olivia Maude Fisher, and W. R. G. Fisher, the children who had then become of age. And thereafter a large indebtedness having accumulated against the property by reason of improvements, taxes, assessments, and insurance thereon to the amount of near $50,000. Mrs. Fisher and her three surviving children, including Millicent Rosa, who had at that time also come of age, sold a portion of said property in Greensboro on the corner of East Market and North Elm streets, to the American Exchange National Bank for $135,000, and contracted to sell two other pieces of said property, including that now in controversy to defendants, for $95,375, receiving a part of purchase money in cash and the remainder secured by a first mortgage on the property. That these defendants, after subdividing the property, resold same to different parties, one lot being sold to L. M. Humphrey at a stated price, and a second lot sold to the plaintiff corporation for $36,300, plaintiff paying in cash $9,300 of said purchase price and giving notes and mortgage for remainder of same, etc. That said Humphrey, purchaser of one of the lots, having refused to pay on the alleged ground that the vendors holding under the deed from Mrs. Fisher and children, did not have a good title to the property, defendants instituted suit to test the question, and same was carried by appeal to the Supreme Court, and it was held that, for reasons stated in the decision, *Thompson v. Humphrey,* 179 N. C., 44, under the will the Fisher children had only a contingent interest in the property, and on the facts as there presented, their deed would not convey an indefeasible title. Pending the case, plaintiff and defendants entered into the agreement now sued upon and later enlarged to the effect that if the Court should hold against the validity of the deed by Mrs. Fisher and her children, and defendants were unable to perfect the title offered by them, in that case the contract of sale between plaintiff and defendants should be set aside, the money paid by plaintiffs returned to them, and their notes canceled and surrendered. That pending the said suit between defendants and Humphrey, or as soon as the decision in the cause was announced, Mrs. Fisher and her surviving children, together with the defendants, instituted a civil action under C. S., 1744, to obtain a sale of said property from Mrs. Fisher and her children at the price of $95,375, on averment that the property was affected by contingent interest, that the sale as made was a most desirable and advantageous one for the estate, and all persons having an interest therein, and in said suit Mrs. Fisher as administratrix *cum testamento annexo* of her husband and as an individual, and her three surviving children, together with the present defendants, were made plaintiffs, and "the unborn children of Olivia Maude Fisher, William Randolph Fisher, and Millicent

Rosa Fisher, and all others having contingent interest in the estate," were described as defendants, and on petition and inquiry duly instituted, Mr. O. C. Cox was regularly appointed guardian *ad litem*, representing all persons having contingent remainders or other contingent interest in the property under said will, etc. In the petition Mrs. Fisher, as administratrix and as an individual, and her children, bring into court all the proceeds of the sales had by them over and above the amount paid out on the accumulated debts, which constituted valid liens of the property, describing how they are now invested, and submitting such investments and property to the court's jurisdiction, and pray that the same, as agreed upon by them, be carried out and confirmed. The cause having been fully heard, the court, at March Term, 1920, his Honor, P. A. McElroy, presiding, found the facts and entered his judgment as follows:

NORTH CAROLINA—GUILFORD COUNTY,
March Term, 1920.

Isabella Fisher, administratrix *c. t. a.* of B. J. Fisher, deceased, Isabelle Fisher, individually, Olivia Maude Fisher, William Randolph Fisher, Millicent Rosa Fisher, American Exchange National Bank of Greensboro, N. C., J. F. Thompson, J. E. Stockwell, G. L. Stanbury, and J. E. Faulkner,

against

The unborn children of Olivia Maude Fisher, William Randolph Fisher, and Millicent Rosa Fisher, and all other heirs at law or contingent remaindermen under the will of B. J. Fisher, deceased.

It appearing to the court that a petition in the above entitled proceedings was filed in this court on 9 March, 1920, and that thereafter O. C. Cox, of Greensboro, N. C., was appointed guardian *ad litem* to represent the interest of contingent remaindermen who are not *in esse*, or who cannot be ascertained; that said guardian *ad litem* has been duly served with summons herein and has filed an answer to said petition; and the court finding from the petition and answer the following facts, to wit:

That B. J. Fisher died in the city of New York, 15 April, 1903, leaving a last will and testament, copy of which is attached to the petition herein, marked "Exhibit A," and made a part thereof; that said last will and testament was duly admitted to probate in the surrogate's court in the State of New York, and thereafter, to wit, on 3 August, 1903, Isabella Fisher duly qualified and was appointed by said court administratrix with the will annexed; that a copy of said last will and testament has been duly and regularly admitted to probate or recorded in the office of the clerk of the Superior Court of Guilford County, as provided by law, and letters testamentary, with the will annexed, have been duly issued to Issabella Fisher; that said last will and testament of B. J. Fisher is recorded in the office of the clerk of the Superior Court of Guilford County in Book "G," page 367; that prior to and at the time of his death said B. J. Fisher was the owner and in possession of several valuable lots and houses and other unimproved real estate in the city of Greensboro, county aforesaid, a portion of which is described in the petition; that on 1 February, 1904, in an action entitled "Isabella Fisher, administratrix, *et al., versus* Olivia Maude Fisher *et al.,*" A. L. Brooks was appointed receiver and commissioner to take charge of the estate of the said B. J. Fisher, deceased, under the control and direction of the court, and that thereafter said estate was administered by A. L. Brooks, receiver, and C. A. Bray, trustee, as will more fully appear from the record of that action on file in the office of the clerk of the Superior Court of said county.

That Elsie May Fisher died while an infant, on or about 6 December, 1909, unmarried and without leaving surviving her any child or children; that the other three children named in paragraph four of said will are petitioners herein, and that none of same have ever married; that each of said surviving children is now, and was at the time hereinafter mentioned, more than 21 years of age; that during the time said C. A. Bray was trustee of said estate he secured an order of court permitting him to erect a building upon the lot belonging to said estate situated at the corner of North Elm and East Market streets, and pursuant to said order said building was erected and an indebtedness of $40,000 was incurred by reason thereof, and a deed of trust securing said indebtedness was authorized and made a lien upon said property; that both of the parcels of land described in the petition had small buildings thereon, and were not yielding to petitioner anything like 6 per cent upon the sale price thereof, after the payment of insurance, taxes, repairs, and other expenses; and Isabella Fisher, Olivia Maude Fisher, William R. G. Fisher, and Millicent Rosa Fisher found that the estate was being gradually depleted and lessened, and after the payment of expenses the income was not sufficient for the proper care and maintenance of said Isabella Fisher; and plaintiffs were compelled to borrow money from time to time, hypothecating said property until at the times hereinafter alleged the total indebtedness against the same amounted to $50,000; that at the October Term, 1914, of Guilford County Superior Court the court signed an order or judgment in the action of Isabella Fisher *et al. versus* Olivia Maude Fisher *et al.,* which provided, among other things: "That the said C. A. Bray, as trustee, may be relieved of any further responsibility as such trustee, upon turning over and transferring to Isabella Fisher, administratrix *c. t. a.* of B. J. Fisher, Isabella Fisher, individually, Olivia Maude Fisher, William R. G. Fisher, and Millicent Rosa Fisher, all of said property and effects now in the hands of said trustees belonging to said estate."

That at the March Term, 1915, of said court, the court rendered judgment affirming a report of a referee, which referee had held that Isabella Fisher was devised a life estate in all the property of B. J. Fisher in America, and that Olivia Maude Fisher, William R. G. Fisher, and Millicent Rosa Fisher are the owners in fee of said estate, subject to the rights in said estate of Isabella Fisher, as will appear from the judgment roll in said case; that said Isabella Fisher, and her children as aforesaid, and the other plaintiffs herein, believed that the said Isabella Fisher owned a life estate in the real estate described in the petition, and that Olivia Maude Fisher, William R. G. Fisher, and Millicent Rosa Fisher owned the remainder in fee simple as tenants in common; that on account of the very small income derived from said property, and the inability of said Isabella Fisher and children to improve or erect larger buildings upon said property, they decided to sell said land and invest the principal in interest-bearing securities; that pursuant to said intention, the said parties entered into a contract to sell and convey to the American Exchange National Bank for the sum of $135,000 that tract or parcel of land in the city of Greensboro, said county and State, at the northeast corner of the intersection of Elm and Market streets, which is fully described in deed from Isabella Fisher *et al.* to American Exchange National Bank, recorded in the office of register of deeds of Guilford County, in Book 298, page 95; that on or about 18 July, 1919, said parties contracted to sell and convey to J. F. Thompson, J. E. Stockwell, G. L. Stansbury, and J. E. Faulkner, for the sum of $95,375, the two tracts or parcels of land lying and being in the city of Greensboro, on the east side of Elm Street, adjoining Howard Garner and others, and fully described in deeds recorded in Book 327, pages 209 and 260, which deeds were executed pursuant to said agreement; that out of the $135,000 received from the American Exchange National Bank, Isabella Fisher paid off and discharged a deed of trust and other indebtedness against said property in the sum of about $50,000, and of the remainder invested $72,000 in Guilford County bonds, bearing 5 per cent interest, and $13,000 in Liberty Bonds.

That said J. F. Thompson and associates paid in cash for the property sold them as aforesaid the sum of $20,875, and executed and delivered to Isabella Fisher and children a first mortgage deed in the sum of $72,500, maturing five years after date, with interest at 6 per cent, payable semiannually, which said mortgage is now outstanding and in full force; and that the $20,000 aforesaid has been invested as follows:

$10,000 in Budd Manufacturing Company, Philadelphia; $5,000 in Hiawatha Coal Company, Philadelphia; $1,000 in Victory Bonds; $3,000 in Liberty Bonds; $1,000 in Penny Corporation, Philadelphia; that the income from the estate of the said B. J. Fisher as it is now invested largely exceeds the income derived from the real estate aforesaid; that the prices received from said land upon the sales aforesaid were full and fair, and said sales were for the best interest of all parties interested in said property; that after the contracts of sale and conveyances as aforesaid, L. M. Humphrey, who had contracted to purchase a part of the property bought by J. F. Thompson and associates, declined to take deed for same and pay the purchase price, alleging that the said property was affected by a contingent remainder, and thereupon a test suit was brought in the name of J. F. Thompson *et al.* *versus* L. M. Humphrey *et al.,* and same was carried to the Supreme Court of North Carolina; that, as will be seen by reference to the opinion of the Supreme Court in said action, said Court held that there are outstanding contingent interests in said property, and that plaintiffs were, or are, the owners of a defeasible fee in said property; that the parties hereto are all the persons and parties *in esse* that have any interest, present or prospective, in said land; that they desire that the purchasers of said property have a good and indefeasible title to the same; that said contracts, agreements, and sales were made for reinvestment.

That the prices offered and paid are full and fair, and were at the time same were entered into; that it is now for the best interest of all parties concerned, and especially the devisees and legatees under the last will and testament of B. J. Fisher, deceased, that said contracts, agreements, and sales be made, confirmed, and approved by this court, and that the proceeds thereof, or purchase money, be invested as provided by Revisal of 1905, sec. 1590, and amendments thereto.

And the court finding these facts to be true, it is now, upon motion, ordered, adjudged, and decreed that the sale and conveyance of the property, described in paragraph 14 of the petition, to the American Exchange National Bank at the price of $135,000 be and the same is hereby in all respects approved and confirmed; and that the sale of the property, described in paragraph 15 of the petition, to J. F. Thompson, J. E. Stockwell, C. L. Stansbury, and J. E. Faulkner be and the same is hereby in all respects confirmed and approved; and that it is for the best interest of all persons concerned, and particularly the contingent remaindermen and devisees under the will of B. J. Fisher, that said property be sold and said proceeds be reinvested as provided by Revisal of 1905, sec. 1590; and to this end Charles A. Hines is hereby appointed a commissioner to execute and deliver deeds conveying to the respective purchasers the property described in the petition, absolutely in fee simple, forever free and clear from all right, title, and interest of all parties in connection therewith, including life tenants, vested remaindermen, and contingent remaindermen, and all right, title, and interest of all of the devisees and legatees under the last will and testament of B. J. Fisher, deceased.

And that the proceeds from said sale be reinvested as provided by law; and that the said Isabella Fisher be and she is hereby declared and designated as trustee to hold said funds as at present invested, subject to the further order of this court as to reinvestment; that she pay the interest and income from said mortgages, stocks, and bonds to herself individually, after payment of taxes and other costs, and the principal she shall hold intact during her life, so that same may be paid, at her death, to the persons entitled thereto under the will of B. J. Fisher, deceased; that to this end she may loan said money upon first mortgage on real estate in Guilford County, or invest the same in bonds of the United States, the State of North Carolina, or Guilford County.

That she shall hold and collect the notes and deeds of trust given her by J. F. Thompson *et al.* for $74,500, and notes and other deeds of trust may be substituted therefor as provided in the original deed of trust, and the new notes thus substituted shall be made payable to Isabella Fisher, trustee or administratrix.

And it is further ordered that the cost of this action, to be taxed by the clerk, and including a fee of $100 to O. C. Cox, guardian *ad litem*, shall be paid by the petitioners herein. P. A. McELROY,

Judge Presiding.

And it appearing further that Charles A. Hines, commissioner, appointed for the purpose, had tendered plaintiff a fee-simple deed for the property pursuant to said decree. His Honor, Judge Webb, at said December Term, 1921, entered judgment as follows:

This cause coming on to be heard at December Term, 1921, of Guilford Superior Court, before the Honorable J. L. Webb, judge presiding, a jury trial having been waived, and being heard by consent upon the facts alleged in the complaint, and either admitted or not denied in the answer, and upon the entire record in the case of "Isabella Fisher *et al.* *v.* the unborn children of Olivia Maude Fisher *et al.*," summons wherein was issued from said court on or about 9 March, 1920, and upon the agreement of the parties that, if the title in plaintiff to the land in controversy is now a good and indefeasible title in fee simple, plaintiff shall take nothing by its action, but shall retain said land, but that, if said title is not now a good and indefeasible title in fee simple, plaintiff shall reconvey to defendants said land without covenants, and that defendants shall thereupon cause to be canceled of record the deed of trust executed by plaintiff to R. G. Vaughn, trustee, and the mortgage executed to defendants by plaintiff, as set out in the contract of 9 September, 1919, attached to the complaint as Exhibit A and returned to plaintiff its note for $22,000 to Isabella Fisher and her children and its note for $5,000 to defendants and pay to plaintiff the sum of $9,300, with interest thereon from 9 August, 1919, together with all interest, recording fees, insurance, and taxes paid on said land by plaintiff, as set out in said contract, and otherwise comply with said contract, damages, in every particular, if any, not to exceed $100, and that plaintiff shall pay to defendants rent for said land at the rate of $90 per month from 1 August, 1919; and

The court being of the opinion and finding that plaintiff is now seized of a good and indefeasible title in fee simple in and to the lands in controversy, to wit, the land described in deed recorded at page 287 of Book 327 of the office of the register of deeds of said county.

It is now, therefore, considered, ordered, and adjudged by the court that plaintiff take nothing by its action, and defendants go hence without day and recover of plaintiff their costs of action, to be taxed by the clerk.

Plaintiff excepts and appeals from this judgment, from the ruling to the effect that the deed now held by plaintiff and offered by said commissioner convey to plaintiff a good title to the property bought by the company.

Cooke & Wyllie for plaintiff.

F. P. Hobgood, Jr., Thomas C. Hoyle, and C. R. Wharton for defendants.

HOKE, J., after stating the case: Under the will of B. J. Fisher, deceased, the property in controversy being a portion of that "situated in America" is devised to his wife for life, or until her remarriage, with a contingent remainder to their children, and to the children of those who had married and died leaving children prior to the time for the vesting of this estate or interest, which is the death or remarriage of the wife. This is held to be the proper construction of the will in *Thompson v. Humphrey,* 179 N. C., 44, where the question is directly presented and determined. While the judge, in one place in that opinion, refers to the interest of these children as a determinable fee, this is evidently a mere inadvertence, and both the reasoning in the case, the authorities cited, and the direct and controlling expressions in the body of the opinion, clearly show that the interest of these children during the life, or until the remarriage of their mother, is but a contingent remainder. *Cilley v. Geitner,* 182 N. C., 714; *Rees v. Williams,* 164 N. C., 128;

S. c., 165 N. C., 201; *Latham v. Lumber Co.,* 139 N. C., 9; *Bowen v. Hackney,* 136 N. C., 187; *Whiteside v. Cooper,* 115 N. C., 570. This being the nature of the estate held by them, the deed of the mother and children, at the time of its execution, did not pass to defendants a good title, for if one of these children should marry and die leaving children before the vesting of their interest, these, the grandchildren of the testator, would take and hold their interest in the property directly from him and under his will, and the deed of their parents, therefore, would have no effect upon that portion of the property. Recognizing that this position would raise some question as to the title offered by defendant, and with the purpose of perfecting same as far as it could be done, Mrs. Fisher, the life tenant, and her children, the contingent remaindermen, together with the defendants who had bought and taken the deed for the property, instituted an action under C. S., 1744, which authorizes a sale of property, in certain instances, whenever there is a vested interest in the same with a contingent remainder over to persons who are not in being, or when the contingency has not yet happened which will determine whom the remaindermen are. The purpose of this statute is not to destroy the interest of the more remote contingent remaindermen, but to enable the present owners to sell the property and make a good title to the same, to hold the proceeds as a fund subject to the claims of persons who may be ultimately entitled thereto, and with this end in view, the statute provides that when the holder of a vested interest and those in immediate remainder, who on the happening of the contingency would then take the property, at the time of action commenced, join in a petition for sale those remotely interested may be represented by guardian *ad litem* duly appointed, and when it is made to appear that the interest of all parties require, or would be materially enhanced by it, the court may order a sale of said property, or any part thereof, for reinvestment, either in purchasing or improving real estate, etc., or invested temporarily to be held under the same contingencies, and in like manner as was the property ordered to be sold, etc. And the authorities hold that where it is shown further that the best interest of all the parties will be thereby promoted, the property may be disposed of at public or private sale, subject always to the approval of the court having jurisdiction of the matter. *McLean v. Caldwell,* 178 N. C., 424; *Dawson v. Wood,* 177 N. C., 159; *Pendleton v. Williams,* 175 N. C., 248; *Thompson v. Rospigliosi,* 162 N. C., 145. The positions more directly pertinent to the facts of this record are set forth in some of the headnotes of the *Dawson case, supra,* as follows:

"Proceedings to have lands sold that are subject to a life estate, with limitation over, on contingencies which will prevent the ascertainment of the remaindermen during the life of the first taker, etc., may be instituted by any person having a present or vested interest in the lands. Pell's Revisal, sec. 509; C. S., 1744."

"The provisions of Laws 1905, ch. 548, requiring that the proceeds of the sale of land under the statute, where the remaindermen of contingent interests cannot be ascertained in the lifetime of the first taker, shall be reinvested in realty within two years, was removed by Laws 1907, chs. 956 and 980, leaving the matter of reinvestment somewhat in the discretion of the court, with the clear intimation that the reinvestment in realty should be made when an advantageous opportunity should be offered."

"In proceedings under the statute (Pell's Revisal, sec. 1590; C. S., 1744) to sell lands held in remainder, upon contingencies rendering the remaindermen incapable of present ascertainment, etc., the necessary parties defendant are those of the remaindermen who, on the happening of the contingency, would have an estate in the property at the time of action commenced, and those remotely interested to be represented and protected by a guardian *ad litem,* as the statute provides."

"Pell's Revisal, sec. 1590; C. S., 1744, providing for the sale of land affected with certain contingent interests does not in its terms or purpose profess or undertake to destroy the interests of the contingent remaindermen in the property, but only contemplates and provides for a change of investment, subject to the use of a reasonable portion of the amount for the improvement of the remainder, properly safeguarded, with reasonable provision for protecting the interest of the unascertained or more remote remaindermen by guardian *ad litem,* etc., and is constitutional and valid."

And in the opinion in *McLean v. Caldwell, supra,* the Court said: "From a perusal of these cases, and the authorities cited therein, it will clearly appear: (1) That on the facts presented the court had full power to order a sale for reinvestment under the statute; (2) that the same can be effected by private negotiations, subject to the approval of the court, when it is properly made to appear that the best interest of all the parties so require. This was the course pursued and directly approved in *Dawson's case, supra;* (3) that ordinarily, and on the facts of this record, the purchaser is not charged with duty of looking after the proper disposition of the purchase money, but when he has paid his bid into court, or to the parties authorized to receive it by the court's decree, he is 'quit of further obligation concerning it.'"

Pursuant to these statutory provisions and with the purpose, as stated, of procuring further assurance of the title in question, Mrs. Fisher and her children and the purchasers under the deed, and with the interest of the more remote remaindermen protected by guardian *ad litem* duly appointed, filed their petition showing the entire investments realized and held from the proceeds of the attempted sale, subjected such investments and their ownership and control of them to the orders and judgment of the court in the cause, allege and show that the sale was for the full value of the property and a highly advantageous one to all the parties in interest, and that the same was in fact necessary owing to the large and accumulating claims against the estate in the way of taxes, assessments, etc., constituting liens upon the property. On these facts being established, and the court having jurisdiction of the parties and the property, we are of opinion that the judgment confirming and authorizing the sale and directing that the fund be properly safeguarded and invested is eminently proper, and has the effect of assuring title heretofore made by defendants to plaintiff. It may be well to note that under recent statutes amending C. S., 1744, Laws 1919, chs. 17 and 259, a bond, in all cases, is required for assuring the safety of funds arising from such a sale. Steps should be taken to modify the decree of Judge McElroy in that respect, the suggested amendment, however, in no way impairing its effect in further assurance of the title.

We find no error in the present record, and judgment of the court that the defendant go without day is

Affirmed.

THE CHAMPION FIBRE COMPANY v. M. E. COZAD, THE WHITING MANUFACTURING COMPANY, ET AL.

(Filed 2 June, 1922.)

1. **Deeds and Conveyances—Registration—Probate—Fiat of Clerk of the Superior Court—Statutes.**

In order to the validity of a conveyance of lands, it is a mandatory requirement of our statute, brought forward and now found in C. S., 3305, that the clerk of the court adjudicate the sufficiency of the act of the probate officer before whom the grantor's acknowledgment has been taken, and issue his *fiat* or order for registration; and while it is held that such act is directory upon the clerk of the Superior Court of the county wherein the land is situated, it is only thus where such *fiat* or order of registration has been properly made by the clerk of another county upon which such power has been conferred by the statute, and in the absence of any proper *fiat* or order for registration, the conveyance will be ineffectual against the rights of purchasers and creditors of the grantor.

2. **Same—Decisions.**

The opinions of the Supreme Court should be construed in the view of the subject-matter as presented in each particular decision, and *it is held*, in reviewing the former decisions upon the question, that the statute is mandatory in requiring that the clerk of the Superior Court adjudicate upon the probate taken to a conveyance of land, and issue his *fiat* or order of registration; though it is not necessary to its validity that the clerk of the Superior Court of the county wherein the land is situated should have passed upon such *fiat* or order for registration made by the clerk of another county, clothed with authority to do so by the statute. C. S., 3305.

3. Courts — Conflict — Opinions — Decisions—Federal Courts—Title to Lands.

Where the decisions of the State Supreme Court and those of the Federal Courts are conflicting in the interpretation of State statutes affecting title to real property situated within the State boundaries, the State decisions will control; and in this case *it is held*, under such conflicting authority, that our State statute requiring clerks of the Superior Court to adjudicate upon the probate to a deed for lands situated here is mandatory, and its omission will invalidate the conveyance as against the rights of purchasers and creditors.

4. Deeds and Conveyances — Registration — Defects — Probate—Fiat—Clerks of Court—Commissioners of Deeds—Title—Mortgages—Sales.

The probate to a mortgage of lands situated in North Carolina, taken by the commissioner of deeds in another State, registered without the *fiat* or order for registration by a clerk of the Superior Court within the State, and clothed with authority to do so by our statute, is ineffectual as against purchasers or creditors to pass title to the purchaser at the foreclosure sale, or those claiming under him. C. S., 3305.

5. Same—Remedial Statutes—Vested Rights.

The act of 1913, now C. S., 3362, authorizing and validating registration of conveyances probated before commissioners of deeds of another state, etc., cannot have the effect of impairing vested rights of purchasers at an execution sale under judgment, or those holding the land under his deed.

6. Deeds and Conveyances—Mortgage—Registration—Defects—Purchasers—Creditors—Judicial Sales—Execution—Title—Common Source.

The purchaser of lands under execution sale not only acquires the title the judgment debtor may have had, but also the right of the creditor; and where a common source of plaintiff's and defendant's title is shown, and a deed of foreclosure in plaintiff's chain of title is fatally defective, he therein fails to show a superior title to that of the defendant derived under the sheriff's deed to the lands sold under execution.

CLARK, C. J., dissenting.

APPEAL by plaintiff from *Webb., J.*, at September Term, 1920, of GRAHAM.

Civil action for the recovery of lands embraced in State Grant No. 2861, and located on the waters of "Little Snowbird" in Graham County.

The plaintiff and the defendants all claim title to the land in controversy under State Grant No. 2861, entry 6748, issued to W. H. Herbert on 18 December, 1865. The defendants at the trial of the cause conceded that the plaintiff was the owner and entitled to the possession of so much of said grant No. 2861 as is lapped upon and covered by grant No. 2830, entry No. 1362, and judgment was entered accordingly; hence this lappage is not in issue on this appeal. The plaintiff admitted on said trial that the defendants were the owners, as their interests might appear, of so much of grant No. 2184, entry No. 1000, as lapped upon grant No. 2861, and judgment was entered accordingly, and this lappage is not in issue on this appeal.

Originally the defendants denied the location of grant No. 2861 as claimed by the plaintiff, and as shown by map attached to the judgment of the court set out in the record, but the question of location was abandoned at the trial and the sole question now before the Court is as to the title to the said grant No. 2861, exclusive of the aforesaid lappages.

The plaintiff Champion Fibre Company claims title to the land embraced in said grant No. 2861, entry No. 6748, by the following paper chain of title:

(1) Mortgage deed from W. H. Herbert to W. E. Snoddy and others, executed 8 December, 1866, and duly registered in the office of the register of deeds for Cherokee, on 23 October, 1867, covering the grants to Herbert in Cherokee County, but which are now in Graham, Clay, and Cherokee, and including the aforesaid grant No. 2861, now in Graham County.

(2) Judgment and proceedings of the Superior Court of Cherokee at March Term, 1873, in the case of W. E. Snoddy *et al.* against W. H. Herbert, adjudging that the plaintiffs recover of the defendant the sum of $8,273.19, secured by said mortgage, which was foreclosed, and appointing S. W. Davidson commissioner to sell at public sale the lands described in the mortgage, and to execute deed therefor.

(3) Deed by Samuel W. Davidson, commissioner, to W. E. Snoddy for 12 tracts of land, including said grant No. 2681, entry No. 6748, bearing date 2 June, 1873, and recorded in Cherokee, 20 April, 1874, and in Graham, 8 May, 1874.

(4) *Mesne* conveyances from Samuel W. Davidson, commissioner, to Champion Fibre Company, which defendants admit passed such title as was vested in W. E. Snoddy by aforesaid deed from Davidson, commissioner.

The defendants claim title to the land covered by said grant No. 2861, exclusive of the aforesaid lappages, through the following paper chain of title:

(1) Judgment in the Superior Court of Alamance County at March Term, 1867, in the case of George W. Swepson against J. D. Harden, W. H. Herbert, and W. H. McKoy; said judgment being for $3,500, with interest from 3 March, 1867, together with the costs of the action.

(2) Deed by the sheriff of Cherokee to Joe Keener for the land embraced in grant No. 2861, said deed being dated 12 May, 1868, and duly registered in Cherokee County.

(3) *Mesne* conveyances from Joe Keener to the defendants, which plaintiff admits passed such title as was acquired by Keener under the sheriff's deed.

(4) Deed from John C. Herbert and wife, heirs at law of W. H. Herbert, to M. E. Cozad, dated 15 May, 1919, covering the land in controversy.

The plaintiff offered evidence that the certified copy of State Grant No. 2861, from the office of the Secretary of State, introduced by the defendants, was identical with and covered the same land as State Grant No. 2861, as registered in the office of the register of deeds of Cherokee.

At the close of all the evidence, the court, being of opinion that the plaintiff was not entitled to recover, directed a verdict for the defendants; and from the judgment rendered thereon the plaintiff appealed.

Smathers & Ward for plaintiff.
R. L. Phillips and Tillett & Guthrie for defendants.

STACY, J., after stating the facts as above: All of the parties to this proceeding, plaintiff and defendants, claim title to the *locus in quo* under State Grant No. 2861, entry No. 6748, issued to W. H. Herbert on 18 December, 1865. The plaintiff claims under a mortgage executed by Herbert to Snoddy (1866), foreclosure proceedings thereunder, and subsequent *mesne* conveyances; the defendants claim under judgment against Herbert and execution sale, followed by sheriff's deed (1868), and later *mesne* conveyances.

On these opposing claims, defendants contend that the plaintiff has failed to show a superior title from the common source; because the mortgage deed from Herbert to Snoddy, under which the plaintiff claims, it is alleged, was not properly probated and registered in accordance with the requirements of the law then in force; and further, for the reason that the foreclosure proceedings were irregular, and the sale by Davidson, commissioner, was never confirmed by the court. Hence, these instruments, defendants contend, are not valid and effective muniments of title as against their claim based upon the execution sale, sheriff's deed, and subsequent *mesne* conveyances.

With respect to the probate of the Herbert mortgage, it appears that the acknowledgment was taken before a commissioner of deeds for North Carolina in the city of New York, 24 December, 1866, certified by him under his official seal, and admitted to registration by the register of deeds of Cherokee County without any further order or *fiat* from the judge or clerk of the court of pleas and quarter sessions, or from any other resident official vested with authority to order said instrument to registration.

The certificates of acknowledgment and registration here called in question are as follows:

STATE OF NEW YORK—CITY AND COUNTY OF NEW YORK.

Be it known that on this 24 December, in the year A.D. 1866, before me personally came and appeared W. H. Herbert, to me personally known, and known to me to be the same person described in and who executed the within mortgage, and he acknowledged to me that he executed the same for the uses and purposes therein mentioned, as witness my hand and seal of office. ISAAC H. HALL,
(Commissioner's Seal.) *Commissioner for North Carolina.*

The foregoing mortgage came to hand and was duly registered in the register's office of Cherokee County, North Carolina, in Book "K," page 212, 23 October, 1867. P. V. BRITTIAN, R. C. C.

Plaintiff contends that the foregoing is sufficient as a valid probate under the provisions of the Revised Code of 1855, chs. 21 and 37, relating to the acknowledgment, proof, and registration of deeds, then in force, and under the following decisions and adjudications: *Holmes v. Marshall*, 72 N. C., 37; *Young v. Jackson*, 92 N. C., 144; *Darden v. Steamboat Co.*, 107 N. C., 437; *Johnson v. Lumber Co.*, 147 N. C., 249; *Hiawassee Lumber Co. v. U. S.*, 238 U. S., 553; *Heath v. Lane*, 176 N. C., 119, and *Sluder v. Lumber Co.*, 181 N. C., 69.

Defendants, on the other hand, contend that the registration of said mortgage deed is invalid and conveys no title as against their claim; because, as appears from the record, it was admitted to registration without any prior adjudication, or *fiat* from any resident officer vested with authority to order the same to registration. For this position, the defendants rely upon the statutes then in force and the following decisions of this Court: *Simmons v. Gholson*, 50 N. C., 401; *Evans v. Etheridge*, 99 N. C., 43; *White v. Connelly*, 105 N. C., 65; *Cozad v. McAden*, 148 N. C., 10; *S. c.*, 150 N. C., 206.

Some apparent confusion and misunderstanding having arisen as to the exact meaning of the decisions in several of the cases above mentioned, it becomes necessary, and, indeed, desirable, for us, in this opinion, to reëxamine these decisions and to point out the basic difference underlying the two classes of cases.

In *Holmes v. Marshall*, *supra*, the acknowledgment there in question was taken before a clerk of the Superior Court in this State, and not before a commissioner of deeds, notary public, or justice of the peace.

Inasmuch as every clerk of the Superior Court in North Carolina has equal jurisdiction with every other clerk in respect to probate matters, this Court held that where the clerk of the court of any county in the State took the acknowledgment of a deed and ordered it to registration, it was not absolutely necessary that the certificate of this clerk be passed upon by the clerk of the court of the county in which the land was situated; the order or *fiat* of the latter clerk, in such cases, being merely directory.

In *Young v. Jackson, supra,* the acknowledgment was taken before the clerk of the court of one county and the deed registered elsewhere in the county where the land was located, without any order of registration and without any action being taken thereon by the clerk of the court of the latter county. It was here held that no order of registration by the local clerk was necessary where the acknowledgment was taken by the clerk of the court of another county, because said clerk, having jurisdiction to order the deed to registration, the requirement that his probate be passed upon by the local court was only directory and not mandatory.

In *Darden v. Steamboat Co., supra,* the acknowledgments were had before clerks of the Superior Court, and there it was held that, as said acknowledgments had been taken by competent officers, no further adjudication by the local clerk was necessary. *Avery, J.,* speaking for the Court, concludes the discussion of this question as follows: "The provision contained in the last sentence of the subsection (section 1246) (2), that the clerk of the Superior Court of the county where the land lies shall pass upon the acknowledgment taken before the other clerks, judges, or justices of the Supreme Court, and determine whether they have taken due form or in the same manner as if he had taken them himself, was not intended to be mandatory, but directory merely." It will be noted that the Court here apparently limits this doctrine to cases in which deeds have been acknowledged "before other clerks, judges, or justices of the Supreme Court." This is as far as the facts of the case warranted the Court in going at that time, and the opinion must be considered in connection with the facts there presented. "Every opinion, to be correctly understood, ought to be considered with a view to the case in which it was delivered." *Marshall, C. J.,* in *U. S. v. Burr,* 4 Cr., 470.

In *Johnson v. Lumber Co., supra,* the question now before us was dealt with as follows: "The statute in force when this foreign acknowledgment, privy examination, and order of registration took place, in 1859, was Rev. Code, ch. 37, sec. 5, which did not contain any requirement, as now, that the probate court here should, after due examination, *adjudge* that the acknowledgment and privy examination were duly proven, and that the certificate was in due form before ordering registration; but said sec. 5, ch. 37, Rev. Code, only required that the instrument, 'being exhibited in the court of pleas and quarter sessions of the county where the property is situate or to one of the judges of the Supreme Court or of the Superior Courts of this State, shall be ordered to be registered with the certificates thereto annexed.' Presumably these officers would not have ordered any such conveyance to registration unless it had appeared to be duly proven and certified in due form. But as the statute did not at that time require the probating officers, as now, to so adjudge as a preliminary condition to making the order of registration, a failure to enter such adjudication as a part of the order does not invalidate the registration, and it was error to exclude the deed as evidence." Here, it will be noted, the Court points out the difference between the old and the new law with respect to the duty of the probate court in *adjudging* that the certificate of acknowledgment or proof was in due form or execution duly proven. But in this case there was a *fiat,* ordering the deed in question to registration; hence, this latter point was not before the Court for decision.

Following these decisions, the United States Supreme Court in *Hiawassee Lumber Company v. U. S.*, 238 U. S., 553, by a divided Court, extended the same principle to acknowledgments taken before commissioners of affidavits and deeds in other states, under the Revised Code of 1855. *Mr. Justice Pitney,* speaking for the Court, said: "It will be observed that in the Code of 1855 a very different effect was given by section 5 of chapter 37 to a certificate of acknowledgment taken by one of the commissioners appointed by the Governor under chapter 21, from the effect given to the proceedings of a commissioner or commissioners specially appointed under section 4 of chapter 37. Proceedings before a special commissioner, being returned to the court, simply formed the basis upon which the court might proceed to adjudge that the deed was duly acknowledged or proved. But an acknowledgment taken by a standing commissioner (an official commissioned by the Governor and holding office during his pleasure), being duly certified, was not to be reviewed judicially before being ordered to registration. So it was expressly held by the Supreme Court of North Carolina in *Johnson v. Lumber Co.* (1908), 147 N. C., 249. And see, to the same effect, *Cozad v. McAden,* 148 N. C., 10; *S. c.*, 150 N. C., 206. That such was the law prior to the adoption of the Code of Civil Procedure was recognized by the Circuit Court of Appeals (202 Fed. Rep., 41). The Code of 1855 did contemplate an order or *fiat* for registration, and there is no evidence that the Olmsted-Stevens deed, when registered in 1869, was accompanied by such an order, except the official certificate that it was '*duly* registered.' But it has been in effect held that the statutory provision for such an order is directory, not mandatory; and that, if the deed be in fact registered after proper probate, the *fiat* becomes nonessential.

Holmes v. Marshall, 72 N. C., 37; *Young v. Jackson,* 92 N. C., 144; *Darden v. Steamboat Co.,* 107 N. C., 437. The first two of these cases were distinguished in *Evans v. Etheridge,* 99 N. C., 43; but this case did not hold that the absence of the *fiat* for registry was fatal."

Logically there would seem to be much reason for this extension by the United States Supreme Court, assuming that the law had been correctly declared in this line of cases, for in section 2, chapter 21, of said Revised Code, relating to the authority of such commissioners, it was provided as follows: "And such acknowledgment or proof, taken or made in the manner directed by the laws of this State, and certified by the commissioner, shall have the same force and effect, for all purposes, as if the same had been made or taken before any competent authority in this State."

If this were a Federal question, the above decision would be binding on us; but in construing our local statutes, especially those pertaining to titles and the registration of deeds, our own decisions are controlling. 25 C. J., 832 *et seq.* It has been held in a long line of decisions that the construction of a State law upon a question affecting the titles to real property in the State by its highest Court is binding upon the Federal Courts. *Williams v. Kirtland,* 13 Wall., 306; *Barrett v. Holmes,* 102 U. S., 655.

In *Carroll Co. v. U. S.,* 18 Wall., 71, *Mr. Justice Strong* delivered the opinion of the Court, and in discussing this question said: "That the construction of the statutes of a state by its highest courts is to be regarded as determining their meaning, and generally as binding upon United States Courts, cannot be questioned. It has been asserted by us too often to admit of further debate. See numerous cases, Bright. Fed. Dig., 163. We have even held that when the construction of a state law has been settled by a series of decisions of the highest state court, different from that given to the statute by an earlier decision of this Court, the construction given by the state courts will be adopted by us. *Green v. Neal,* 6 Pet., 291; *Suydam v. Williamson,* 24 How., 427; 16 L. Ed., 742; *Leffingwell v. Warren,* 2 Black, 599; 17 L. Ed., 261. And we adopt the construction of a state statute settled in the courts of the state, though it may not accord with our opinion. *McKeen v. Delaney,* 5 Cranch, 22."

After a careful and full examination of all the cases bearing on the subject, we are constrained to believe that the learned justice who wrote the opinion in the *Hiawassee Lumber Company case* was misled by several expressions in our reports. This much is said with all due deference. Indeed, so great is our respect and regard for the decisions of the Federal Supreme Court that we were led to adopt and to sanction its conclusion in this very case, by a dictum in the recent case of *Sluder v. Lumber Co.,* 181 N. C., 69, which we now wish to correct and to disapprove.

The decision in *Heath v. Lane, supra,* was only a repetition and reaffirmation of what was said in *Holmes v. Marshall, supra.* And, therefore, it is to be classed with the same line of cases.

It should be remembered that in *Holmes v. Marshall, supra,* and *Young v. Jackson, supra,* we were departing from a strict and literal construction of the words used in the statute; and in *Darden v. Steamboat Co., supra,* a definite limitation as to how far we should go in that direction apparently was suggested and pointed out. Furthermore, in several cases we had expressly held that such powers of probate had not been given to commissioners of affidavits and deeds, resident in other states.

In the case of *Evans v. Etheridge, supra,* the facts, with respect to the probate of the deed of trust, there called in question are strikingly similar to those in regard to the probate of the Herbert mortgage in the case at bar. Upon this phase of the matter, *Davis, J.,* delivering the opinion of the Court, said:

"It is insisted by the appellees that the deed in question was proved in compliance with this section before a commissioner of affidavits, and that the adjudication of the clerk is only directory, and not an essential prerequisite to registration, and that, having been registered upon the certificate of the commissioner, though without any adjudication and order of registration by the clerk, it is valid, and, the purposes of registration being to give notice, the spirit and purpose of the law is fully met. We are referred to a number of cases (*Young v. Jackson,* 92 N. C., 144; *Holmes v. Marshall,* 72 N. C., 37, and other cases) in which it was held that 'the provision requiring the certificate of probate by the probate judge of a county other than that of registration to be passed upon by the probate judge (the clerk) of the county of registration is directory, and that a registration which has not been so passed upon is not void.' The analogy between those cases and that before us is lost in the fact that the functions of the clerk are broader than those of the commissioner. He not only takes the proof of acknowledgment, but *adjudges* the fact of 'due execution,' whereas the commissioner of affidavits, and perhaps others, only take and certify the acknowledgment or proof. 'Probate of deed is taken,' says *Pearson, J.,* in *Simmons v. Gholson,* 50 N. C., 401, 'by hearing the evidence touching the execution, *i. e.,* the testimony of witnesses or acknowledgment of the party—and from that evidence *adjudging the fact* of its execution. Where the evidence is offered to the court, the entire probate is taken by it; but where the agency of a commissioner is resorted to, a part of the probate, *i. e.,* hearing the evidence, is taken by him and certified to the court, and thereupon the probate is perfected by an adjudication that the certificate is in due form, and that the fact of the execution of the deed is established by the evidence so certified.' In cases of probate before clerks who can both take the evidence and adjudicate the fact, it has been held that though it ought not to be omitted, the *fiat* of the clerk of the county of registration is not an absolute prerequisite to a valid registration, but the validity of the registration in such cases rests upon the fact that there has been an adjudication of 'due execution' by an officer competent to both hear evidence and adjudicate. The register has no authority to put the deed upon his books unless proved and so adjudged in some one of the modes prescribed by the statute. 'The probate is his warrant for doing so,' and if registered without this warrant it does not create such an equity in the mortgage trustee as to affect creditors or subsequent purchasers for value. It was so adjudged in *Todd v. Outlaw,* 79 N. C., 235, and we refer to that case and the authorities there cited."

Again, this question was discussed in a clear and conclusive opinion by the present *Chief Justice* in the case of *White v. Connelly,* 105 N. C., 65. There the acknowledgment to a deed of trust had been taken in Iredell County before a justice of the peace, and Connelly, the defendant, being clerk of the court, undertook to pass upon the certificate of the justice of the peace who had taken the clerk's own acknowledgment. It was held that the clerk could not pass upon this certificate; whereupon the contention was made that inasmuch as the certificate was from a justice of the peace of Iredell County, the register of deeds would be justified in admitting the deed to registration without any *fiat* from the clerk or other officer. The Court held otherwise, saying that a justice of the peace had no power "to probate deeds and order them to registration."

But the precise point we are now considering was before the Court in the case of *Cozad v. McAden,* 148 N. C., 10. There a deed made by W. H. Herbert (the same person who executed the mortgage in the case at bar) in 1867 was acknowledged before a commissioner of deeds, prior to the act of 1868, and registered in 1869, without any further order or *fiat* from the local court. This was held to be insufficient. The present *Chief Justice,* speaking for this Court, said:

"The plaintiff then offered a certified copy of the deed of 1 February, 1867 (Herbert to Hineman), from the register of deeds of Cherokee County (in which the land lay in 1869), showing that it had been registered in that county 30 September, 1869, but this was properly rejected, there being no order of registration from the clerk. The endorsement was simply, 'The foregoing deed came to hand 30 September, 1869, and was then duly registered,' etc., giving book and page, and signed by the register. The invalidity of such registration upon the certificate of the commissioner of deeds, without an adjudication by the clerk, is decided, *Evans v. Etheridge,* 99 N. C., 43. It is true that at that time the statute did not require the probate to be registered (*Perry v. Bragg,* 111 N. C., 163; *Cochrane v. Improvement Co.,* 127 N. C., 386), if there was in fact a proper probate that could be shown. But it was indispensable that there should at least be a *fiat* from the clerk ordering the deed to be registered. Revised Code, ch. 37, sec. 5. The nullity of registration without authority is too well settled to need discussion. *Todd v. Outlaw,* 79 N. C., 235, and numerous cases therein cited, as well as those since, which have approved and followed it, which last will be found in the annotated edition of 79 N. C."

It may be noted that this case was reheard (150 N. C., 206), and a part of the opinion reversed with reference to the form of the order of registration as to two other deeds, but that part of the opinion quoted above was not affected by the rehearing, and has never been changed. Upon the second hearing, the Court still adhere to the ruling that an order of registration by some competent officer was necessary. This was at that time, and is now (C. S., 3305), a legislative requirement, and we are not at liberty to dispense with it.

Recurring again to the decision of the United States Supreme Court in the *Hiawassee Lumber Company case,* for the purpose of considering it more in detail, we may observe in the outset that the judge of the District Court, the three judges sitting in the Circuit Court of Appeals, together with *Justices Day* and *Hughes* of the Supreme Court of the United States, were of the opinion that the probate in that case was insufficient under our statutes. *Mr. Justice McReynolds* took no part in the decision; hence, only six members of the National Supreme Court participated in the majority opinion. We mention this only for the purpose of showing the degree of uncertainty which had arisen over the question, and it has been our purpose here to try to collect the pertinent cases on the subject and to undertake to set the matter at rest. If it be found that the provisions of the statutes, as now enacted, sometimes make for hardships and injustice, the Legislature alone may remedy the situation and bring about a change, if such be needed or desired.

In the first part of the opinion of the United States Supreme Court, quoted above, emphasis is placed upon the difference between sections 4 and 5 of chapter 37 of the Code of 1855. Because section 4 required an *adjudication* and section 5 required an *order,* the Court seems to have reached the conclusion that the requirements of the former were mandatory while those of the latter were directory only. In fact, it is said in the opinion that such was the effect of our holding in *Johnson v. Lumber Co.,* 147 N. C., 249. But we do not think that the decision in

Johnson's case supports this conclusion. In that case the order of the court of pleas and quarter sessions merely directed that said deed and certificate of the commissioner "be recorded and registered in Jackson County," without any adjudication that the certificate was "in due form and according to law." This was held to be sufficient. Note, however, there was an *order* or *fiat* directing that the deed be registered.

In the last part of the quotation from the opinion in the *Hiawassee Lumber Company case,* above set out, it is said that the decision in *Evans v. Etheridge, supra,* "did not hold that the absence of the *fiat* for registry was fatal." We do not think this conclusion is supported by what was decided in the *Evans case, supra.* There the deed was acknowledged before a commissioner of deeds, in the District of Columbia, and registered without any further order or *fiat.* It was held that this registration was "without proper warrant," and, therefore, invalid as against the plaintiff's claim. We think it is manifest that the deed was rejected on account of "the absence of the *fiat* for registry." No other reason was stated in the opinion for denying its validity.

But it is contended that the defective probate and registration of the mortgage from Herbert to Snoddy has been cured, and the foreclosure proceedings had thereunder validated by the act of 1913, now C. S., 3362, which provides as follows: "Any deed or other instrument permitted by law to be registered, and which has, prior to the third day of March, one thousand nine hundred and thirteen, been proved or acknowledged before a commissioner of deeds, is validated; and its registration is authorized and validated. Nothing in this section affects litigation pending 3 March, 1913."

Plaintiff contends that the mortgage, under which it claims, was registered on 23 October, 1867, prior to the execution sale and deed dated 12 May, 1868, under which the defendants claim, and that, therefore, the curative act above mentioned made good any defects in the probate and registration of the said mortgage and perfected the plaintiff's title to the property covered thereby. We are unable to agree with this conclusion under the facts of the instant case. It has been consistently held with us that while these curative acts are remedial in character and beneficent in purpose—making for the saving of titles, and not for their destruction—yet they will not be permitted to impair or to interfere with the vested rights of others. *Sluder v. Lumber Co.,* 181 N. C., 72; *Downs v. Blount,* 31 L. R. A. (N. S.), 1076, and authorities collected in note; 6 R. C. L., 361; *Weston v. Lumber Co.,* 160 N. C., 268, and cases there cited.

Speaking to this question, in *Powers v. Baker,* 152 N. C., 718, the present *Chief Justice,* in delivering the opinion of the Court, said: "Validating statutes of this nature have always been within the power of the General Assembly, *Tatom v. White*, 95 N. C., 453, though such statute would not be valid against a deed from the same grantor duly registered, or a lien acquired against the grantor, before the validating act. *Barrett v. Barrett*, 120 N. C., 127. But the validation of the probate of a deed from Stickney to the plaintiff would be good against the defendant, who does not claim under Stickney." This fits our case exactly. The plaintiff and the defendants are all claiming title to the land in dispute under W. H. Herbert, who acquired it by grant from the State. The defendants, therefore, stand in the position of creditors, claiming, as they do, under one who purchased at an execution sale. There is nothing in the record to show what Keener bid for the property at the sheriff's sale, but the judgment, under which the execution was levied, amounted to $3,500, with interest from 3 March, 1867, together with the costs of the action. As far back as *Briley v. Cherry*, 13 N. C., 5, it was declared by *Henderson, J.*, that one who comes in under a sheriff's sale at execution is not only clothed with the title of the defendant in the execution, but also with the rights of the creditor, which may be paramount to those of the debtor *quoad* the thing sold. See, also, *Dancy v. Duncan*, 96 N. C., 111; 10 R. C. L., 1324.

Again, in *Barrett v. Barrett*, 120 N. C., 131, the present *Chief Justice*, further animadverting upon the effect of curative statutes, said: "It is competent for the Legislature to provide what mode of probate shall be valid, and when it does so, it can affect past as well as future probates, except that the rights of third parties, claiming prior to the validating act, cannot be divested. Retrospective legislation is not necessarily invalid. It is only so to the extent it would divest vested rights."

We, therefore, conclude that the mortgage deed from Herbert to Snoddy was registered without any proper probate or warrant therefor, and that such registration was insufficient to give the plaintiff's claim of title superiority over that of the defendants, who stand in the position of creditors.

This makes it unnecessary for us to consider the remaining exceptions.

After a full and careful consideration of the entire record, we find no error, and the judgment for defendants must be upheld.

No error.

CLARK, C. J., dissenting: The plaintiff and defendants both claim title to the land in controversy under State Grant No. 2861, entry No. 6748, issued to W. H. Herbert, 18 December, 1865. The plaintiff claims under a decree of foreclosure of a mortgage securing $8,273.19, executed by W. H. Herbert, 8 December, 1866, and duly recorded in Cherokee. The defendants claim under a chain of title beginning with the sale under an execution in favor of George W. Swepson on a judgment obtained by him at March Term, 1867, in Alamance, and sale thereunder 12 May, 1868, at which the purchaser paid for the entire tract 25 cents (as recited in the sheriff's deed, set out in full in the record).

The alleged invalidity of plaintiff's chain of title rests upon an alleged technical defect in the registration of the Herbert mortgage, properly acknowledged before a commissioner of deeds for this State in New York City, 24 December, 1866, which was duly certified, and was admitted to registration in Cherokee, 23 October, 1867.

The probate of the Herbert mortgage was before the commissioner of deeds for North Carolina in the city of New York on 24 December, 1866, who certified the same under his official seal, and the mortgage was admitted for registration without further order in Cherokee on 23 October, 1867.

This registration was valid under the statute in force at that time, as held in *Holmes v. Marshall,* 72 N. C., 37; *Young v. Jackson,* 92 N. C., 144; *Darden v. Steamboat Co.,* 107 N. C., 437; *Johnson v. Lumber Co.,* 147 N. C., 249; *U. S. v. Hiawassee Lumber Co.,* in the U. S. Supreme Court, 238 U. S., 553, cited as authority since in *Sluder v. Lumber Co.,* 181 N. C., 69.

In *Sluder v. Lumber Co., supra, Allen, J.,* held valid a probate before a commissioner of affidavits for North Carolina in Maryland in 1856, and this case, together with the *Eversole Lumber Company case, supra,* and the *Hiawassee Lumber Company case, supra,* seem to be the only cases based upon similar probates by a commissioner of affidavits of this State in other states, under the Revised Code of 1855, under which the probate in the present case was taken. The case last cited held valid a similar probate made in 1868, and the *Eversole Lumber Company case* held valid a similar probate made in 1859.

In the *Sluder case, supra, Mr. Justice Allen* said: "There is no order of the clerk of the Superior Court of Jackson County ordering this deed to registration. We do not think this invalidates the registration. It has been, in effect, held that a *fiat* for registration is not absolutely essential. The statutory provision for such an order is directory and not mandatory. If the deed be in fact registered under proper probate, the lack of a *fiat* does not invalidate the registration," citing the above cases. This is the latest case and should be controlling.

The defendants cite a number of cases which they claim overrule the above, but examination shows that all the cases cited by them are as to probates under a different statute from that in force when the probate in this case was made. *Cozad v. McAden,* 148 N. C., 10, was as to a probate before a commissioner of deeds of this State in another state in 1893, and that probate was governed by the terms of the Code of 1883.

Evans v. Etheridge, 99 N. C., 43, was decided in 1888, and passed upon a similar probate which was made 22 May, 1886, and was therefore also governed by the Code of 1883. The apparent conflict in the opinions of this Court as to the validity of probates made by commissioners of this State in other states disappears because of the change in the statute. The Revised Code of 1855, under which the probate was made in this case, was materially changed by Battle's Revisal, which itself was later modified by the Code of 1883.

The registration, as already stated, was valid under the statute in force at the time this registration was entered, as held in the cases above cited; but, if it had been defective, the defect was cured by the act of 1913, now C. S., 3362, as follows: "Any deed or other instrument permitted by law to be registered, and which had, prior to 13 March, 1913, been proven or acknowledged before a commissioner of deeds, is valid; and its registration is authorized and valid. Nothing in this section affects litigation pending 3 March, 1913." The registration in this case was made 23 October, 1867, prior to the sale under the subsequent execution on 12 May, 1868, and, besides, no litigation as to this matter was pending 3 March, 1913.

A. K. LEDFORD v. THE VALLEY RIVER LUMBER COMPANY.

(Filed 2 June, 1922.)

1. **Appeal and Error—Evidence—Objections and Exceptions—Harmless Error.**

In an action to recover damages for an injury alleged to have been caused the defendant's employee by a defective power-driven machine at which he performed his duties, evidence on the trial that the defendant, after the injury, rectified the alleged defect in conformity with arrangements used on other like machines for safety, is erroneously admitted; but the error is rendered harmless when the defendant itself has brought out this evidence later on the trial.

2. **Instructions—Construed as a Whole—Appeal and Error—Proximate Cause—Contentions.**

Where the trial judge has correctly charged the jury as to the elements they should consider in the amount of damages recoverable for a personal injury, his failure to have specifically instructed them that such must be the immediate and necessary consequences of the injury is not reversible error, when from the statement of the contention of the parties and the other relevant parts of the charge the jury must have understood the principle of law applicable.

3. **Damages—Personal Injuries—Proximate Cause—Measure of Damages.**

For a personal injury proximately caused by the negligence of another, damages past, present, and prospective are recoverable in one sum, fixed by the jury as being, in their judgment, upon the evidence, a fair and reasonable compensation to the plaintiff, in which they may indemnify the plaintiff for actual nursing, medical attention, etc., and consider his age, prospects, wages, salary, or income from his profession, his mental and physical sufferings, upon evidence tending to show that the injury proximately caused them, the sum so awarded to be on the basis of a present cash settlement.

APPEAL by defendant from *Brock, J.*, at the April Term, 1922, of CHEROKEE.

Civil action to recover damages for an alleged negligent injury. The plaintiff was injured while operating a "lay and sand belt" in the defendant's furniture factory at Murphy, N. C., on 14 August, 1920. He alleges that his injury was due to the negligence of the defendant in failing to exercise ordinary care in undertaking to furnish him a reasonably safe place to work.

Upon denial of liability and issues joined, the jury returned the following verdict:

"1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: 'Yes.'

"2. Did the plaintiff, by his own negligence, contribute to his injuries, as alleged in the answer? Answer: 'No.'

"3. What damage, if any, is the plaintiff entitled to recover? Answer: '$4,000.'"

Judgment on the verdict in favor of plaintiff, from which the defendant appealed.

J. H. McCall and J. N. Moody for plaintiff.
M. W. Bell and Harkins & Van Winkle for defendant.

STACY, J. It is assigned as error that the defendant's witness, W. W. Killian, on cross-examination, and over objection, was permitted to testify that the belt which caused the plaintiff's injury was open and unprotected before the accident, and that other belts of a similar kind in the factory had been guarded and encased since the present injury. This evidence, standing alone and by itself, if offered to establish negligence, would have been incompetent, as we have said in a number of decisions, notably *Aiken v. Mfg. Co.*, 146 N. C., 324; *Myers v. Lumber Co.*, 129 N. C., 252, and *Lowe v. Elliott,* 109 N. C., 581. In the last case just cited it was held: "In an action by an employee to recover for injuries alleged to have been received in consequence of defective machinery used by his employer, the fact that after the injury the defendant substituted machinery of different material and adopted additional precautions in its use is no evidence of negligence."

But this same witness, later, at the instance of the defendant, on redirect examination, and, of course, without objection, testified to the same state of facts. This rendered the previous admission of the same evidence harmless. *Tillett v. R. R.,* 166 N. C., 520; *Smith v. R. R.,* 163 N. C., 146; *Young v. R. R.,* 157 N. C., 78; *Marshall v. Tel. Co.,* 181 N. C., 411, and cases there cited. "The erroneous admission of evidence on direct examination is held not to be prejudicial when it appears that, on cross-examination, the witness was asked substantially the same question and gave substantially the same answer." *Hamilton v. Lumber Co.,* 160 N. C., 48. To like effect are the decisions in *Smith v. Moore,* 149 N. C., 185, and *Blake v. Broughton,* 107 N. C., 220, where it was held that the admission of improper evidence was harmless when it appeared that the fact thereby sought to be shown was otherwise fully and properly established.

The defendant also excepts to the following portion of his Honor's charge on the issue of damages: "Upon that issue, if you come to consider it, you will take into consideration the injury; you will take into consideration the earning capacity of the plaintiff prior to the injury and subsequent; you will take into consideration his suffering, and say what in your judgment, after a careful consideration of all the facts and circumstances, and answer what the plaintiff is entitled to recover under all the facts and circumstances. You will apply, in considering the answer, to the third issue the rule of justice, and say what, if anything, the plaintiff is entitled to recover."

This excerpt, standing alone, might appear to be subject to some criticism; but, taken in connection with the whole charge, we do not think the jury could have been misled by it. His Honor stated fully the contentions of the parties, and the jury must have understood that they were to allow only such damages as were "the immediate and necessary consequences of the injury." *Wallace v. R. R.,* 104 N. C., 451.

In cases like the one at bar, if the plaintiff be entitled to recover at all, he is entitled to recover as damages one compensation—in a lump sum—for all injuries, past and prospective, in consequence of the defendant's wrongful or negligent acts. These are understood to embrace indemnity for actual nursing and medical expenses and loss of time, or loss from inability to perform ordinary labor, or capacity to earn money. Plaintiff is to have a reasonable satisfaction (if he be entitled to recover at all) for loss of both bodily and mental powers, or for actual suffering, both of body and mind, which are the immediate and necessary consequences of the injury. And it is for the jury to say, under all the circumstances, what is a fair and reasonable sum which the defendant should pay the plaintiff, by way of compensation, for the injury he has sustained. The age and occupation of the injured party, the nature and extent of his business, the value of his services, the amount he was earning from his business, or realizing from fixed wages, at the time of the injury, or whether he was employed at a fixed salary, or as a professional man, are matters properly to be considered. *Rushing v. R. R.,* 149 N. C., 158. The sum fixed by the jury should be such as fairly compensates the plaintiff for injuries suffered in the past and those likely to occur in the future. The award is to be made on the basis of a cash settlement of the plaintiff's injuries, past, present, and prospective. *Penny v. R. R.,* 161 N. C., 528; *Fry v. R. R.,* 159 N. C., 362.

The motion for judgment as of nonsuit was properly overruled. Upon a full and careful consideration of the entire record, we have found no reversible error, and this will be certified to the Superior Court.

No error.

MARGARET A. HATCH, ADMINISTRATRIX OF GEORGE W. HATCH, v. ALAMANCE RAILWAY COMPANY.

(Filed 2 June, 1922.)

1. **Actions — Wrongful Death—Statutes—Conditional Right—Limitation of Actions—Pleadings—Proof.**

An action to recover damages for a death caused by wrongful act did not lie at common law and exists in North Carolina by provision of our statute, C. S., 160, requiring that it be brought within one year, not as a statute of limitation, which must be pleaded, C. S., 405, but as a condition annexed to the plaintiff's cause of action, and which he is required to prove at the trial to sustain his statutory right of recovery.

2. **Same—Summons—Alias Summons—Continuity of Process.**

Where, in an action to recover damages for a death caused by a wrongful act, C. S., 160, the summons has been issued within a day or two from the termination of the year, annexed as a condition, and returnable thereafter, and according to the officer's certificate thereon, uncontradicted, it was not returned at the term therein named, but at a later term of the court, with another summons issued upon affidavit after the period required by the statute, endorsed "alias original," without further indication that it had been issued for an alias process or on order from the judge: *Held,* such service is insufficient to meet the requirement that the action shall be commenced within a year from the date of the wrongful death.

3. **Same—Jurisdiction—Service—Corporations—Copies of Process.**

While an action is commenced against the defendant when the summons is issued against him, C. S., 404, 475, jurisdiction of the cause and of parties litigant can only be acquired in actions *in personam* by personal service of process within the territorial jurisdiction of the court unless there is an acceptance of service or a voluntary general appearance, actual or constructive, and where the defendant is a corporation, the requirement that copies thereof be delivered to certain designated officers or to the local agent, must ordinarily be strictly observed and certified to by the process officer, etc., as required by law, in order to a valid service of process.

4. Same.

Where the local officer of a corporation for the service of summons has read the summons, but in good faith has mistakenly informed the process officer that he was not the one upon whom valid service could be made, but that it should be made on the defendant's president living in a different county, and without leaving the copies as the statute requires, the process officer served the summons on the president, as designated, after the return term, and the certificate of the officer shows only the service on the latter: *Held*, neither the conversation with the local agent nor the pretended service of the original summons on the president after the return day was effective to confer jurisdiction, and the service in each instance was a nullity.

5. Process—Summons—Alias—Continuity—Actions.

The failure of service of the original summons in an action must be followed by alias or pluries writ or summons successively and properly issued in order to preserve a continuous single action referable to the date of its issue, for otherwise it is a discontinuance as to the defendant; and another summons served after the break in the chain is a new action.

6. Same—Statutes.

In an action to recover damages for the death by wrongful act, required by the statute to be brought within a year, C. S., 160, the process officer failed to make a valid service upon an agent of defendant corporation, by not leaving a copy of the process, and after the return term served the first summons on the defendant's president, and at the same time another process, marked by the clerk "alias original" summons, without anything in the second summons to indicate its alleged relationship to the original: *Held*, the service of the first summons being fatally defective, and the last not conforming to the law in respect to the issuance of alias summons so as to relate back to the original, the service upon the defendant's president after the period fixed as a condition to the right of action, is fatally defective, and the plaintiff cannot recover.

7. Same—Wrongful Death—Appearance—Waiver.

Where the original service on a corporation is fatally defective for failure of the process officer to leave a copy of summons with defendant's agent as required by the statute, and another summons has been properly served on the defendant's president, but without preserving the continuity of the process, in an action to recover damages for a wrongful death under the provisions of C. S., 160: *Held*, the appearance of the defendant to resist recovery upon the ground that the plaintiff had not brought his action within the year, is not a voluntary appearance, and will not amount to a waiver of service of process within that period, as to the first summons, the service of the second summons being valid, and it being permissible for the defendant to await the plaintiff's evidence upon his allegation that he had brought his action within the time required by the statute as a condition annexed to his right thereof.

8. Appeal and Error—Legal Inferences—Process—Summons—Service.

Where, as a conclusion of law upon the facts appearing, the judge of the Superior Court adjudges that summons against a corporation had been served according to the requirements of our statutes, it is subject to review on appeal to the Supreme Court.

CLARK, C. J., dissenting; STACY, J., concurs in the dissenting opinion.

APPEAL by defendant from *Daniels, J.*, at September Term, 1921, of ALAMANCE.

Plaintiff brought suit against the Piedmont Power & Light Company and the Alamance Railway Company to recover damages for the alleged negligent death of her intestate. The Alamance Railway Company operates an interurban street car line connecting Burlington, Graham, and Haw River, and the Piedmont Company owns a plant in which electricity is generated for running the cars. The intestate, in January, 1918, was in the employ of the Alamance Railway Company, and on 22 January was operating a freight car on the company's line for the purpose of clearing the tracks of ice and snow. There was an unsecured air pump in the car. Near Graham the car was derailed and turned over and the pump fell upon the intestate, causing his death. The complaint sets out several alleged acts of negligence. There was denial by the defendant and a plea of contributory negligence. At the conclusion of the evidence the court dismissed the action against the Piedmont Company, and retained it against the railway company. Issues of negligence, contributory negligence, and damages were answered in favor of the plaintiff.

The intestate's death occurred on 22 January, 1918. The original summons was issued 13 January, 1919, and on that day the sheriff went to the offices of the two defendants and informed J. H. Hardin, their local agent, that he had for service a summons against the defendants in favor of the plaintiff, advised him of the contents, and tendered him a copy of the summons for each defendant. Thereupon Hardin, believing that he was not a proper person upon whom the summons could be served, in good faith told the sheriff that he was not an officer of either of the companies, nor a proper person upon whom to make service, and that J. H. Bridgers was the president of each company. The sheriff did not put either copy of the summonses in the possession of Hardin; but he kept them in his own possession and departed. Hardin was not an officer of either company, but at that time was performing the local duties of the president during the latter's temporary absence. Said Bridgers lived in Henderson. The sheriff relied on Hardin's statement, and made no effort to serve the president in the county of his residence, but awaited his return to Alamance.

The summons, which was issued on 13 January, 1919, was returnable to a criminal term of one week, which convened on 3 March; the sheriff made no return on the summons to that term, but kept it in his possession; no application was made at the return term for an alias summons, nor was an alias issued or ordered. On 10 April, 1919, one of the attorneys for the plaintiff filed before the clerk a sworn statement that a summons had been issued on 13 January, and turned over to the sheriff, and that the summons had never been served on Bridgers. The clerk then issued a summons marked alias (10 April), returnable 26 May, which was served on Bridgers by the manual delivery of two copies; and at the same time the sheriff made manual delivery of two copies of the original summons. There was no session of the Superior Court between the March and May terms.

The defendant insisted that the action was not commenced within twelve months after the death of the intestate.

Judgment for plaintiff. Defendant appealed.

E. S. W. Dameron, J. Elmer Long, and W. S. Coulton for plaintiff.
F. P. Hobgood Jr., for defendant.

ADAMS, J. The legal right to recover damages for death caused by wrongful act did not exist at common law, and was first conferred in England by Lord Campbell's Act, 9 and 10 Vict., ch. 93 (1846). Thereafter the main features of this statute were enacted by the General Assembly, and are now included in the Consolidated Statutes. Section 160 provides, in part, that when the death of a person is caused by the wrongful act, neglect, or default of another, . . . the person or corporation causing the death shall be liable to an action for damages to be brought by the personal representative of the deceased within one year after such death. The words "to be brought within one year" have been interpreted, not as a statute of limitation, which must be pleaded (C. S., 405), but as a condition annexed to the plaintiff's cause of action; and at the trial the plaintiff must prove that his action was instituted within the time prescribed by law. *Taylor v. Iron Co.,* 94 N. C., 526; *Best v. Kinston,* 106 N. C., 206; *Gulledge v. R. R.,* 147 N. C., 234; *S. c.,* 148 N. C., 568; *Hall v. R. R.,* 149 N. C., 109; *Trull v. R. R.,* 151 N. C., 546; *Bennett v. R. R.,* 159 N. C., 346.

At the hearing the defendant contended that the plaintiff's action had not been instituted within twelve months after the intestate's death, and at the conclusion of the evidence sought a directed verdict both by motion and by written request. The intestate's death occurred on 22 January, 1918. The original summons was issued on 13 January, 1919, and was returnable to a criminal term of one week, beginning on 3

March. It was received by the sheriff on the day it was issued, but was not returned to the March term. In fact, it was not served, according to the officer's certificate, until 10 April, and was then returned to the May term. On 10 April, upon affidavit filed by an attorney for the plaintiff, the clerk issued another summons against the defendant, returnable to the May term (26 May). This summons was indorsed "alias original," but there was nothing else to indicate that it was intended for alias process; it was issued without an order from the judge, and was served on 10 April and returned with the original summons to the May term. The act to restore the provisions of the Code of Civil Procedure in regard to process and pleadings went into effect 1 July, 1919.

An action is commenced as to each defendant when the summons is issued against him (C. S., 404, 475), but in actions *in personam* jurisdiction of a cause and of parties litigant can be acquired only by personal service of process within the territorial jurisdiction of the court, unless there is an acceptance of service or a general appearance, actual or constructive. *Bernhardt v. Brown,* 118 N. C., 701; *Vick v. Flournoy,* 147 N. C., 212; *Warlick v. Reynolds,* 151 N. C., 610; 21 R. C. L., 1315. The summons must be served on a corporation by the delivery of a copy thereof to one of certain designated officers or to a local agent (C. S., 483); and this requirement, it is held, must be strictly observed. *Allen v. Strickland,* 100 N. C., 226; *Smith v. Smith,* 119 N. C., 314; *Lowman v. Ballard,* 168 N. C., 18. In the case last cited, *Hoke, J.,* says: "Authority here is also to the effect that when a statute provides for service of summons or notices in the progress of a cause by certain persons or by designated methods, the specified requirements must be complied with or there is no valid service." The case of *Aaron v. Lumber Co.,* 112 N. C., 189, also is directly pertinent; and, indeed, is decisive of the question here presented. The constable in the township in which the defendant had its principal place of business served the summons by "handing" it to the president and the secretary and treasurer of the defendant. They were the only officers. They read the summons and returned it to the constable. The court held that since no copy of the summons was left with either officer, the pretended service was not legally sufficient. In *Amy v. City of Watertown,* 130 U. S., 317, *Mr. Justice Bradley* said: "The cases are numerous which decide that when a particular method of serving process is pointed out by the statute, that method must be followed, and the rule is especially exacting in reference to corporations," and cites *Kibbe v. Benson,* 84 U. S., 624; *Alexandria v. Fairfax,* 95 U. S., 774; *Settlemier v. Sullivan,* 97 U. S., 444; *Evans v. R. Co.,* 14 Mees. & W., 142; *Walton v. Universal Salvage Co.,* 16 Mees. & W., 438; *Brydolf v. Wolf,* 32 Iowa, 509; *Hoen v. A. & P. R. Co.,* 64 Mo., 561; *Lehigh Valley Ins. Co. v. Fuller,* 81 Pa., 398.

The appeal shows, not a technical irregularity in the service of the summons, but a total failure of the service of the first summons. The statute in plain terms requires the delivery of a copy of the summons, and provides that the proof of service shall be the certificate of the officer, the affidavit of the printer, or the written admission of the defendant.

Very clearly, in our opinion, the interview between the sheriff and Hardin, the local agent, did not amount to service of the summons. The judge found that Hardin acted in good faith and not with intent to deceive. No copy was left with him, and the certificate of the sheriff, which is the proof provided by statute, shows service, not on Hardin, but on Bridgers, the president. The cases cited by the plaintiff—*Johnson v. Johnson,* 86 Ga., 450; *Taylor v. Cook,* 1 N. J. L., 54—are not relevant to the facts in the case at bar. In the former the officer, by mistake, left a copy of the writ at the home of the defendant's brother, and the defendant accepted such delivery as service; and in the latter the defendant directed the place of service.

A proper application of these principles provides substantial support for the argument that neither the officer's conversation with Hardin nor the pretended service of the original summons on the president after the return day was effectual to confer jurisdiction. In each instance such service was a nullity. In the latter case, after the return day the writ lost its vitality, and service thereafter made could not confer upon the court jurisdiction over the defendants so served. 19 Ency. P. & P., 600; 21 R. C. L., 1273; 32 Cyc., 456; *S. v. Kennedy,* 18 N. J. L., 22; *Hitchcock v. Haight,* 7 Ill., 603; *Draper v. Draper,* 59 Ill., 119; *Peck v. La Roche,* 86 Ga., 314; *Cummings v. Hoffman,* 113 N. C., 268; *Peebles v. Braswell,* 107 N. C., 68; *Mfg. Co. v. Simmons,* 97 N. C., 89.

If service of the original writ was ineffectual, what was the legal import of the second summons? Did it mark the commencement of a new action or relate back and continue in effect the suit originally begun? That the original summons must be followed by process successively and properly issued in order to preserve a continuous single action referable to the date of its issue, is familiar learning. This successive process is an alias or pluries writ or summons. *Fulbright v. Tritt,* 19 N. C., 492; *Penniman v. Daniel,* 91 N. C., 434; *S. c.,* 93 N. C., 332; *Etheridge v. Woodley,* 83 N. C., 11; *Battle v. Baird,* 118 N. C., 861. Such is the manifest significance of C. S., 481: "A failure to keep up the chain of summonses issued against a party, but not served, by means of an alias or pluries summons, is a discontinuance as to such party; and if a summons is served after a break in the chain, it is a new action as to such party, begun when the summons was issued."

We must, therefore, determine (1) whether there was a break in the chain of process, and (2) whether the second summons continued the original suit.

Chitty says: "If the proceeding should be by writ of summons, then the plaintiff, or his attorney, must return *'non est inventus,'* and enter the same of record in due time. . . . If it be necessary to continue the first writ of summons, then an alias or pluries may be issued into the same or another county; and it is very essential to take care that the first writ, whether of summons or capias, be in due time returned *non est inventus,* and that every continued process to save the statute of limitations must have a memorandum indorsed or subscribed, specifying the date of the first writ." Chitty's Practice, 408; 3 Bl., 280 *et seq.;* Tidd's Practice, 111; Elliott's Gen. Practice, 459; 20 Ency. P. & P., 1178; 32 Cyc., 445; 21 R. C. L., 1266.

This principle is approved in our decisions. In *Fulbright v. Tritt, supra,* the facts are stated as follows: "The plaintiff, on 20 September, 1834, sued out a writ in case for *slanderous words,* commanding the sheriff to take the 'body of Henry Tritt for Archibald Tritt,' to answer, etc. At Fall Term, 1834, the sheriff returned the writ 'executed on Henry Tritt—A. Tritt not to be found.' No process issued from this term against Archibald Tritt. At Spring Term, 1835, the plaintiff entered a *nol. pros.* as to Henry Tritt, and issued what the clerk indorsed as an *alias* writ, but which was in its terms an original writ, against Archibald Tritt, returnable to Fall Term, 1835; and the sheriff returned the same 'not found.' Then a writ, which the clerk called a *pluries,* but which was in terms an *alias,* was issued, returnable to Spring Term, 1836. This was executed; and the defendant appealed and pleaded *the statute of limitations.* The speaking of the words, as charged in the declaration, was within six months of the issuing of the original writ against 'Henry Tritt for Archibald Tritt,' but not within six months of the date of the first writ issued against Archibald Tritt, which was on 15 April, 1835." *Daniel, J.,* said: "If the original writ had been correctly issued against Archibald Tritt, returnable to Fall Term, 1834, as he was not arrested, the plaintiff should have issued an *alias* from that term. There was not an *alias* issued from that term, and the first suit was *discontinued.* The writ which issued on 15 April, 1835, against Archibald Tritt, must be considered the original in this action." *Fulbright's case* is approved in *Etheridge v. Woodley, supra; Webster v. Laws,* 86 N. C., 180; *Hanna v. Ingram,* 53 N. C., 55. In the case last cited reference is made to an intervening term, but in *Fulbright's case* it was held that the alias should have issued from the term to which the original summons was returnable.

In *Webster v. Laws, supra,* the facts were these: "The summons in the action was issued by a justice of the peace on 9 August, 1879, and the cause tried on 20th of the month. The defense set up was the pendency of another suit, instituted before another justice for the same cause of action and between the same parties, the warrant in which was returnable on the same day when the second suit was begun, but it does not appear to have been served. On the return day the justice who issued the first warrant was absent from the county and remained away several days. No further action was taken therein until some time afterwards, when an entry of nonsuit was made on the docket of the justice by himself. Upon these facts the Court declared, as matter of law, that the first action was depending and undetermined at the time of the issuing and serving of the summons in the second action, and gave judgment against the plaintiffs, from which they appealed."

Smith, C. J., said: "We do not concur in the ruling that, upon the facts founds, the first action was pending when the second action was begun. The process not having been served, was exhausted on the day fixed for its return, and the action was in law then discontinued. This has been repeatedly decided in this Court. *Fulbright v. Tritt*, 19 N. C., 491; *Governor v. Welch*, 25 N. C., 249; *Hanna v. Ingram*, 53 N. C., 55; *Etheridge v. Woodley*, 83 N. C., 11.

"A discontinuance of process is different from a discontinuance of the action. 'When a plaintiff leaves a chasm in the proceedings of his cause,' says Mr. Sellon, 'as by not continuing the process regularly from day to day and term to term, as he ought to do, the suit is discontinued and the defendant is no longer bound to attend.' 2 Sellon's Prac., 458; 3 Black. Com., 296."

From these authorities we deduce the conclusion that the original action was discontinued, unless preserved by the summons issued on 10 April. There is no contention that it was a pluries writ. Was it an alias? In the caption are the words "alias original," but there is nothing more to indicate that it was intended as alias process. In *Simpson v. Simpson*, 64 N. C., 428, it was held that the character of process purporting to be original is not changed by an indorsement of the word "alias." As was said in *Fulbright's case*, the alias should have issued from the return term. To the suggestion that the original had not then been returned there are two answers. In the first place, there is abundant authority that alias process follows the return of the original. Chitty's Prac., *supra;* Tidd's Prac., *supra;* Elliott's Gen. Prac., *supra;* 20 Ency. P. & P., *supra;* 32 Cyc., *supra;* 21 R. C. L., *supra.* Here the original summons was in the hands of the sheriff when the second was issued, and they were served together. If the return of the original process was necessary the second evidently was not an alias; and, in the second place, if the return of the original was not necessary, the order for the alias should have been applied for at the return term; and in any event there should have been something in the body of the second summons to indicate its alleged relation to the original.

True, the original summons was returnable to a criminal term—but in accordance with the statute: "At criminal terms of court, all civil process may be returned and pleadings filed which may be returned and filed at civil terms; motions may be heard upon due notice, and trials in civil actions may be heard by consent of parties." C. S., 1444. *Watson v. Mitchell,* 108 N. C., 364. "Motions upon due notice" are formal motions, as for alimony (*Zimmerman v. Zimmerman,* 113 N. C., 434), or to set aside a judgment (*Allison v. Whittier,* 101 N. C., 490), but not such as are merely incidental to the progress of a pending action. *Coor v. Smith,* 107 N. C., 431.

Nor did the defendant waive its right to insist that the plaintiff had not complied with the statutory condition. It is true that the voluntary appearance of a defendant is equivalent to personal service of summons upon him (C. S., 490); and if this statute and the decisions construing it were applicable to the record in this case, the plaintiff's argument would merit serious consideration. But they are not applicable for the reason that the defendant's appearance was not voluntary. Appearance was made and an answer filed in response to proper service of the second summons; and if the defendant had not answered, the plaintiff no doubt would have recovered a judgment for the entire amount demanded in the complaint. The defendant's appearance was necessary to its resisting recovery in the action instituted by the plaintiff when the second summons was issued. The complaint alleges that the action was instituted within less than one year after the death of the plaintiff's intestate, and the allegation is denied in the answer. The defendants were not required to take action or move for judgment of nonsuit until the plaintiff's evidence was concluded, because service of the second summons was good. But then, at the first opportunity, the defendant insisted that the pretended service of the first summons was void, that the second was the beginning of the action in which the answer was filed, and that the defendant was therefore entitled to a directed verdict.

His Honor did not find as a fact that the defendants were served with summons on 13 January, but upon facts determined merely adjudged that the summons issued at that time was duly served. It is hardly necessary to remark that this is a judicial order or determination of his Honor, involving a matter of law or legal inference, which is subject to review on appeal. In like manner, the statement of Hardin that he was not a proper person upon whom process should be served was an inference of law which did not absolve the officer from the duty of knowing, or ascertaining, whether or not such legal conclusion was correct.

Disregarding the question of a want of power to impart vitality to an exhausted process, we are unable to adopt the suggestion that his Honor's finding of the facts was intended by way of amendment to validate a defective service.

Upon the facts disclosed by the record, we are constrained to hold that the action was not instituted within the statutory period, and that it cannot be maintained. The defendant was entitled to an instruction to this effect. For this reason the judgment is set aside and his Honor's refusal to grant the defendant's motion for a directed verdict is

Reversed.

CLARK, C. J., dissenting: The judge, by consent, found the facts as follows: "The plaintiff's intestate was killed 22 January, 1918. The original summons was issued 13 January, 1919, and on that day the sheriff went to the office of the two defendants and informed J. H. Hardin, their local agent, that he had for service a summons against the defendants in favor of the plaintiff, advising him of its contents, and tendered him a copy of the summons for each defendant, which he refused to accept, and told the sheriff that he was not an officer of either of the companies, nor a proper person upon whom to make service, and that J. H. Bridgers, a nonresident, was the president of each company. The sheriff thereupon did not place either copy of the summonses in the possession of Hardin; but he kept them in his own possession and departed. Hardin was not an officer of either company, but at that time was performing the local duties of the president during the latter's temporary absence. The sheriff, relying on Hardin's statement, made no effort to serve the president in the county of his residence, but awaited his return to Alamance."

C. S., 483, provides that "if the action is against a corporation, the summons shall be served by delivering a copy thereof to the president, or other head of the corporation, secretary, cashier, treasurer, director, managing or *local agent* thereof." It has been repeatedly held that the term "local agent" is not limited to those receiving money for the company, *Copland v. Tel. Co.*, 136 N. C., 11, and that service is valid when made upon a general or local agent, *Anderson v. Fidelity Co.*, 174 N. C., 417, and cases there cited, and the definition of "local agent" is fully stated in *Whitehurst v. Kerr,* 153 N. C., 76; *Moore v. Bank,* 92 N. C., 590, and other cases cited under C. S., 483 (1).

It is clear, therefore, that the officer, having informed J. H. Hardin that "he had for service a summons against the defendants in favor of the plaintiff, advised him of the contents, and tendered him a copy of the summons for each defendant" that the defendants cannot profit by the disavowal of their agent, who informed him that he was "not an officer of either company, nor a proper person upon whom to make service," though, as the judge finds, Hardin made the misstatement in good faith.

The *bona fides* of the agent in making this statement is not material. He was the proper person on whom to serve the summons; he was informed of the contents of the paper and a copy of the summons for each of the defendants was tendered to him. This was equivalent to service upon the defendant company, which was not more fully complied with by leaving a copy, because the local agent refused to accept the copies tendered to him, and informed the officer, untruly, that service could not be made on him. The defendant certainly should not be allowed to profit by the wrong of its representative in refusing, whether in good faith or not, the copies tendered and in making the misstatement that he was "not a proper person" upon whom the summons could be served.

It would seem, certainly, that the sheriff did all that he could do, unless he had violently thrust the papers upon the local agent, whom he did inform of the contents of the summons, and who prevented service by refusing to receive the summons and misrepresenting to the sheriff that he was not a proper person upon whom to serve the paper.

Judge Daniels correctly "adjudged that the summons was duly served on the defendants, 13 January, 1919." The service was complete with the single exception that a copy of the summons was not left with the defendant.

Whether fraudulent evasion of service was intended or not, as a matter of fact, Hardin was a proper person upon whom to serve the summons, its contents were made known to him, copies of the summons were tendered to him, he refused to accept them, and misled the officer by informing him that he was not the proper party upon whom to serve the summons. For the purpose of service of summons, the agent and acting president was the defendant itself, and his act should not be allowed to vitiate such service and deprive the plaintiff of an opportunity to have his wrongs investigated and tried by the action of the very person through whom the law directed the notice of this action should be given.

It is true the sheriff mistakenly returned the summons as not served, but that is immaterial when, as correctly found by the judge, the summons, in fact, was duly served.

It is true that the return by the sheriff of process "not" served is *prima facie* sufficient, but this can be cured either by appearance or by showing the fact to be otherwise. When a sheriff has been sued for penalty in not serving a process when he has returned it "served," it has been held that the return can be contradicted and the penalty recovered if such is the fact, and when, as in this case, the sheriff returned it not served when in fact it was, the truth of the facts can be ascertained, and the judge in this case has adjudged correctly that this summons was served.

C. S., 490, provides: "A voluntary appearance of a defendant is equivalent to personal service of the summons upon him," and under this it has been held in 20 cases cited under that section, that "a general appearance waives all defects both as to summons and service." *Moore v. Packer,* 174 N. C., 665, and cases there cited. It is also held: "General appearance cures all defects in service of process," *Drainage District v. Comrs.,* 174 N. C., 738, and other cases cited under C. S., 401. Under all these cases it is held that however defective the service of process, or when there has been no process issued at all, the party is as fully in court by a general appearance (which filing an answer is) as if the summons had been properly issued and duly served.

Moreover, appearance in an action dispenses with the necessity of process. *Wheeler v. Cobb,* 75 N. C., 21, and very numerous cases since then. Among the latest cases being *Rackley v. Roberts,* 147 N. C., 207; *Vick v. Flournoy, ibid.,* 216; *Grant v. Grant,* 159 N. C., 531, quoting the "learned opinion of *Walker, J.,* in *Scott v. Life Association,* 137 N. C., 517." *Hatcher v. Faison,* 142 N. C., 364; *Harris v. Bennett,* 160 N. C., 339. Indeed, there are numerous cases that although there has been no summons at all issued, a general appearance, by filing an answer or otherwise, makes service of summons at all unnecessary. Irregularity in service of summons is waived by defendant answering, although he is an infant; *Turner v. Douglas,* 72 N. C., 127. Irregularity of summons is waived by appearance and plea in bar; *Cherry v. Lilly,* 113 N. C., 26. A general appearance, even before a referee, cures all antecedent irregularity; *Roberts v. Allman,* 106 N. C., 391.

It would indeed be a great hardship when, as the jury finds in this case, the plaintiff's intestate was killed by the negligence of the defendant, without contributory negligence on his part and assessed the damages at $10,000, the family should nevertheless be barred of recovery because the sheriff, misled by the defendant, erroneously returned the summons "not served" when in fact it had been.

This action was brought upon allegation that the defendants were common carriers, and practically one and the same corporation, doing business in different names, but operated from the same office and having practically the same agents, servants, and owners, and being under the same general management, and that in January, 1918, the plaintiff's intestate, an employee of these companies and acting under instructions of said companies' superior officers and agents, and while assisting in the operation of their cars over the same track, was killed by the negligence of the defendants in failing and refusing to furnish plaintiff's intestate proper and up-to-date cars and appliances in ordinary use at that time; that they were dangerously constructed; and further, that by their negligence in the management of said cars, and in refusing to have a sufficient number of hands to operate them; and by reason of the defective manner in which the appliances in use were built, as well as in the failure to have proper appliances, the plaintiff's intestate was killed. The details of the negligence are set out in the complaint very fully and completely.

The judge, having found as a fact that the defendants were served with summons on 13 January, 1919, upon J. H. Hardin, the local agent, and acting president of both corporations, he being for the purpose of service of summons the corporations themselves, and that he was informed that the officer had the summons for service upon him and the object of the suit, the refusal to accept the summons tendered him, and the misstatement made by him to the sheriff were the acts of the defendants, and there having been sufficient service within the statutory time, the cause was submitted to the jury. Upon full evidence of the transaction, the jury found, upon the issues submitted to them, that the plaintiff's intestate had been killed by reason of the negligence of the defendant, as alleged in the complaint, and that he did not by his own negligence contribute to the injuries which resulted in his death, as alleged in the answer, and assessed the plaintiff's damages at $10,000.

Upon this ascertainment of the facts by the jury, it would seem clear that the defendant should not, by reason of the untrue statements of their acting president and local agent to the officer who attempted to serve the process, be released from all liability if there was any technical irregularity in the manner of the service, it having been caused, as the judge finds, by the action of the defendants through their own officer and agent.

The defendants seek to deprive the plaintiff of compensation for the wrongful death, which the jury finds was inflicted on the husband and father of the beneficiaries in this action, upon the technical ground that a copy of the summons was not served upon the defendant companies and they rely upon a single case, *Aaron v. Lumber Co.*, 112 N. C., 190. But that case differs from the present in two essential particulars: (1) In that case the constable had no copy of the writ and could not have left a copy. In this case, the judge finds as a fact that a "copy of the summons for each of the defendants was tendered" to the acting president and local agent of the defendant, and he refused to receive these copies and misled the officer by telling him that he was not the proper party on whom to leave them. (2) Again, in *Aaron's case, supra,* the defendants entered no appearance, and judgment was taken before a justice of the peace by default. In the present case the court adjudged that "service was duly made on 13 January, 1919," as a matter of fact and of law, and the defendants took no exception to this ruling of the judge, but filed an answer and amended answer and remained in court two years and a half raising no exception to the finding of the judge that there had been sufficient service until the conclusion of the evidence at the trial in September, 1920. Surely the plaintiffs ought not to lose their recovery of compensation for the wrong inflicted by the negligence of the defendants because the defendants' acting president and local agent refused to accept the copies of the summons which were tendered him for each defendant and by his erroneous statement induced the officer to leave without forcing the copies of the summons upon him.

The plaintiff in ample time issued their summons, and were in no default, for the court adjudged correctly, and without any exception on the part of the defendants, that "the summons was duly served on the defendants 13 January, 1919."

STACY, J., concurs in dissent.

NORMAN JAMES, FOR HIS NEXT FRIEND, HERBERT H. JAMES, v. CITY OF CHARLOTTE.

(Filed 2 June, 1922.)

1. **Municipal Corporations—Cities and Towns—Government—Negligence—Damages.**

A municipality, acting within the exercise of a purely governmental function, including generally all those existent or imposed upon them by law for the public benefit, is not liable for the negligence of its agent or employee, unless a right of action therein is given by statute.

2. **Same—Statute—Collecting Garbage.**

A city is in the exercise of a governmental duty in collecting garbage from the residence of its inhabitants under an ordinance passed in accordance with the provisions of C. S., 2799, and is not liable in a civil action for damages to one injured by the negligence of its drivers of the carts or wagons when so engaged, there being no provision of law conferring such right.

3. **Same—Speed Limits—Criminal Law—Misdemeanors.**

C. S., 2618, fixing a speed limit for motor vehicles, etc., and making its violation a misdemeanor, is a cumulative right of action given at common law for the recovery of damages for a personal injury caused by the negligent acts of another, and can confer no right of action to recover damages in such instances against a city, by reason of the violation of this statute by a driver of a motor cart or wagon in collecting garbage, etc., under an ordinance passed in pursuance of the provisions of C. S., 2799, the remedy, if any, being by indictment.

4. **Same—Business for Profit.**

It is the primary duty of the owner or occupant of the premises to remove his garbage, etc., therefrom, under an ordinance passed in pursuance of C. S., 2799; and upon his failure thereof, the city may remove

> the same under certain requirements of the owner or occupants, with its own carts or wagons; and the fact that the city is permitted to charge the cost of such service does not change its act from a governmental function to a business for profit, or affect its nonliability for the negligent acts of its agents or employees therein.

APPEAL by plaintiff from *Finley, J.*, at February Term, 1922, of MECKLENBURG.

Civil action, heard on demurrer *ore tenus* to the facts as alleged and admitted in the pleadings. The pertinent facts being that in July, 1921, plaintiff, while standing on a sidewalk of a street or alley in the city of Charlotte was run into by a truck negligently driven by an employee of the city, and in excess of speed permitted by the statute law directly controlling the matter, C. S., 2618, and received serious and permanent injuries. That said employee, at the time, was operating the truck in the service of the sanitary department of the city, removing certain materials from private property pursuant to municipal regulations, the city collecting a charge for the same, the fee allowed by the statute. There was judgment sustaining the demurrer, and plaintiff excepted and appealed.

J. D. McCall and John M. Robinson for plaintiff.
C. A. Cochran and C. W. Tillett, Jr., for defendant.

HOKE, J. The statute under which the regulations were chiefly made, and the employee operating the truck at the time, C. S., 2799, contains provision as follows: "The governing body may by ordinance provide for the removal, by wagons or carts, of all garbage, slops, and trash from the city; and when the same is not removed by the private individual in obedience to such ordinance, may require the wagons or carts to visit the houses used as residences, stores, and other places of habitation in the city, and also may require all owners or occupants of such houses who fail to remove such garbage or trash from their premises to have the garbage, slops, and trash ready and in convenient places and receptacles, and may charge for such removal the actual expense thereof."

In *Harrington v. Greenville,* 159 N. C., 632-634, it is stated as the recognized doctrine in this jurisdiction that "unless a right of action is given by statute, municipal corporations may not be held civilly liable to individuals for failure to perform or negligence in performing duties which are governmental in their nature, and including generally all duties existent or imposed upon them by law, solely for the public benefit." Citing *McIlhenney v. Wilmington,* 127 N. C., 146; *Moffitt v. Asheville,* 103 N. C., 237; *Hill v. Charlotte,* 72 N. C., 55.

And *Mack v. Charlotte,* 181 N. C., 383; *Howland v. Asheville,* 174 N. C., 749; *Snider v. High Point,* 168 N. C., 608; *Peterson v. Wilmington,* 130 N. C., 76, and other cases with us are in approval of the position. In *Snider v. High Point, supra,* the employee, whose negligence caused the injury, was engaged in the removal and destruction of garbage and other refuse matter under the sanitary regulations of the city, and the decision of the Court denying liability on the ground that the employee at the time was engaged in performance of duties governmental in their nature would seem to be controlling against the plaintiff on the facts of the present record.

In a recent decision of the Supreme Court of the United States, *Adelbert Harris v. District of Columbia,* 41 Supreme Court Reporter, 610, the same principle is fully recognized. It is contended for plaintiff that the position referred to does not apply to the facts of the present record because it appears that the employee at the time was in violation of the speed regulations applicable, and constituting the negligence complained of a misdemeanor, C. S., 2618, but we are of opinion that the exception cannot be sustained.

It is recognized that "a statute which merely makes that a crime, misdemeanor, or offense, punishable by a penalty or forfeiture, which before its passage was already a legal wrong to individuals injured thereby, redressible by civil action or suit, does not take away the pre-existing cause of action, unless it is so declared expressly or by necessary implication." 1 Cyc., 681. But where there is no legal wrong existent and the statute purports to create a new offense and provides a remedy, there, as a rule, the remedy provided must be pursued, and none other. *S. v. R. R.,* 145 N. C., 495-539; 7th Lawson's Rights and Remedies, sec. 3777; 2d Waites, Actions and Defenses, p. 109.

Applying the principle as to private persons, individual or corporate, the negligence condemned and made a misdemeanor in C. S., 2618, was actionable at common law, and therefore the section is regarded as cumulative to the right of action existent at common law, but as to municipal corporations, when in the exercise of governmental functions, no right of action existed at common law, and the liability, if any, arises only by statute, and as to them, therefore, the statutory remedy by indictment is alone given and must be pursued.

Again it is insisted that the city is not protected from liability in this instance because it charges a fee for removal of garbage, but the position is without merit. True, we have held in several cases that where a municipal corporation enters into the business of selling light and power to its citizens for profit, they are not regarded as being in the exercise of governmental functions, and under proper circumstances may be held to civil liability. *Munick v. Durham,* 181 N. C., 188; *Harrington v. Wadesboro,* 153 N. C., 437; *Fisher v. New Bern,* 140 N. C., 506.

But the principle invoked has no application where, as in this instance, the city merely makes a charge covering the actual expense of removing garbage and refuse in discharge of a duty primarily incumbent on the individual citizen and occupant of property. The decisions to which we were referred in the learned brief of appellee's counsel are in full support of their position on this question. *Moulton v. Fargo,* 167 N. W., 717.

We find no error in the record, and the judgment of nonsuit must be Affirmed.

IN RE SHERRILL HARRIS.

(Filed 2 June, 1922.)

1. **Constitutional Law—Ambiguity—Local Laws—Courts—Statutes—General Statutes—Inferior Courts.**

The amendment of our State Constitution, effective 10 January, 1917, now appearing as Article II, section 29, of the Constitution, among other things, prohibiting "local, private, or special legislation relating to the establishment of courts inferior to the Supreme Court," etc., must be defined by reference to the context and existing conditions, and is sufficiently ambiguous to admit of interpretation; and as applied to the establishment of recorders' courts, the court will take cognizance of the efficiency and the number of such courts theretofore existent; and the more recent statutes under which other such courts have been added, and at the time of the enactment of the original statute affecting the question there were 56 counties in the State within which they have been established, with only 44 counties to the contrary, in determining whether an amendment to a recent statute permitting several additional counties to establish them comes within the constitutional inhibition as a local law.

2. **Same—Presumptions.**

The interpretation of a statute, as to whether it is a local one, prohibited by Article II, section 29, of our Constitution, under the recent amendment, should be largely left to the facts and circumstances of each particular case, giving significance to the rule that legislative acts are presumed to have been rightfully passed from proper motives, and that a classification of this kind, when made by them, should not be disturbed unless it is manifestly arbitrary and invalid.

3. **Same—Amended Statutes.**

A general law permitting the establishment of recorder's courts in the State, excepting certain counties to the number of 44, leaving 56 within the provisions of the statute, is not a local law within the intent and meaning of Article II, section 29, of our Constitution (a recent amendment), nor is a late statute amending the former general law taking a

certain county and two others out of the excepted class enumerated in the general statutes, unconstitutional as a local or special act as to those counties, the effect of this statute being a reënactment of the general law including the particular counties.

CLARK, C. J., concurs in result.

APPEAL by defendant from *Long, J.*, in *habeas corpus* proceedings instituted and heard before him at chambers, 18 April, 1922, from IREDELL.

Cause presented on writ of *certiorari,* duly issued from this Court, to review a decision of Long, J., on petition of Sherrill Harris.

From perusal of the record, it appears that under C. S., ch. 27, subch. 4, as amended by Laws 1921, ch. 110, a recorder's court was established for Iredell County. Acting under provisions of said law and the jurisdiction thereby conferred, defendant was, on 27 February, 1922, convicted of the criminal offense of selling spirituous liquor and sentenced to imprisonment for a term of six months and assigned to work on the roads, etc., during said term, without felon stripes. That, being held under said sentence, the defendant filed his petition for *habeas corpus* before his Honor, B. F. Long, resident judge, Fifteenth Judicial District, on the alleged ground that the judgment against him was illegal and void. Chiefly for the reason that the act providing for the establishment of said court and conferring jurisdiction thereon, was in violation of Article II, section 29, of the Constitution prohibiting local, private, or special legislation in various matters therein specified, and including acts relating to the establishment of courts inferior to the Supreme Court. On the hearing, his Honor being of opinion that the act was in all respects constitutional and valid, entered judgment in denial of plaintiff's application, and he was remanded to custody and is now held under said sentence of the recorder's court. Thereupon said petitioner applied for and obtained this writ of *certiorari*, on petition, and which was duly filed and served for the purpose, as stated, of reviewing the adverse judgment in *habeas corpus* proceedings, and the validity of the sentence under which the petitioner is being detained.

Zeb V. Turlington for petitioner.

W. D. Turner, Long & Jurney, Lewis & Lewis, and Grier & Grier for respondent.

HOKE, J. In the fall of 1916 there were several amendments made to our Constitution, becoming effective 10 January, 1917. *Reade v. Durham,* 173 N. C., 668; *Mills v. Comrs.,* 175 N. C., 215. Among these amendments, appearing chiefly in Article II, section 29, there is an inhibition against passing "local, private, or special act or resolution relating to the establishment of courts inferior to the Supreme Court, authorizing the laying out, opening, altering, or discontinuing of highways, streets, or alleys; relating to ferries or bridges," etc. After the adoption of these amendments, the General Assembly, in 1919, chapter 277, the same being entitled "An act to establish a uniform system of recorders' courts for municipalities and counties in the State," provided for the establishment of such courts, and in section 64 exempted from the effect and operation of the law 10th, 18th, 19th, and 20th Judicial districts, and the 11th Judicial District, except Caswell County, and ten additional counties, by name: Anson, Chatham, and eight others, the exemption now appearing in C. S., 1608. Later, in ch. 110, Laws 1921, some amendments were made to the general statute, and Iredell and Granville and Cherokee counties were withdrawn from the excepted cases and brought within the provisions of the general law, the result being that the general statute applied to about 56 counties in the State, and 44 were excepted from its provisions, and it is contended by the petitioner that the statute under which the court has been established is a "local and special law" within the meaning of the constitutional inhibition. In *Mills v. Comrs.,* 175 N. C., 215, a statute authorizing the commissioners of Iredell and Catawba counties to provide for building bridges over the Catawba River, which had been washed away by a recent flood, was challenged as being in violation of the constitutional provision, and speaking to the meaning of the word "local" as contained in the amendments, the Court, among other things, said: "It is said in some of the decisions on the subject that the significance of the term 'local' in constitutional provisions of this character is comparatively of recent use and importance, and has received no fixed or generally recognized meaning. Like other legislation or written instruments sufficiently ambiguous to permit of construction, it must be defined by reference to the context, the purpose appearing in the terms of the law and the attendant circumstances relevant to its true interpretation. In Lewis' Southerland Statutory Construction it is said (2 ed., sec. 199, p. 358) 'That special laws are those made for individual cases. . . . Local laws are special as to place'; and further (at sec. 200): 'It seems impossible to fix any definite rule by which to solve the question whether a law is local or general, and it has been found expedient to leave the matter, to a considerable extent, open, to be determined upon the special circumstances of each case."

A position that is in accord with the comments as to the meaning of the word "local" appearing in *Gray v. Taylor et al.,* 227 U. S., 51. And in further reference to the amendments it was said: "It is well understood that our General Assembly, at session after session, was called on by direct legislation to authorize a particular highway or street, or to establish a bridge or ferry at some specified place. Such questions being not infrequently at the instance of rival parties or opposing interests, were urged and debated with great earnestness by their respective advocates and renewed and protracted to such an extent that they were of serious detriment to the public interests, and, at times, prevented full and proper consideration of vital public measures. The Legislature, in these cases, was in fact called on to usurp, or rather to exercise, functions which were more usually and properly performed by the local authorities, and it was in reference to local and special and private measures of this character that these amendments were adopted, and, as stated in *Brown's case, supra,* it was never intended to prohibit legislation authorizing the raising of proper funds by the sale of bonds or by taxation for measures required for the public good, though such funds should be for the improvements in some fixed place or in restricted territory, determined upon by local authorities in pursuance of general laws on the subject." This principle of interpretation as to the meaning of these amendments had been previously announced in *Brown v. Comrs.,* 173 N. C., 598, and has been approved since in several decisions of the Court where the subject was directly and fully considered. *Huneycutt v. Comrs.,* 182 N. C., 319; *Comrs. v. Bank,* 181 N. C., 347; *Comrs. v. Pruden,* 178 N. C., 394; *Martin County v. Trust Co.,* 178 N. C., 27; *Parvin v. Comrs.,* 177 N. C., 508. In *Huneycutt's case, supra, Associate Justice Stacy,* for the Court, said: "Thus it will be seen that the purpose of the act in question was not to authorize the laying out, opening, altering, or discontinuing of any given road or highway, but to provide ways and means by which the general road work of the entire county might be successfully carried on and maintained. The two highway commissions hitherto existing in the county were to be abolished and one new central system established. It has been held with us in a number of cases that acts of this character do not fall within the constitutional prohibition against local or private legislation."

Under these decisions and the construction they uphold as to the true intent and meaning of these amendments, the statute in question would seem to be a valid law, and this, in our opinion, is undoubtedly true when it is considered that the statute is designed and intended to provide for as many as 56 out of the 100 counties of the State, and could in no sense be regarded as a local or special law within any usual or ordinary meaning of these terms. It is well known that at the time this law was enacted there were 20 or 25 of these recorders' courts already established and doing satisfactory work, and in the remaining excepted counties it was estimated that the regular courts were then so fixed in time and number as to afford adequate facilities for the administration of public justice in those counties. It is always presumed that a Legislature acts rightly and from proper motives, and a classification of this kind, when made by them, should not be disturbed unless it is manifestly arbitrary and invalid. 25 R. C. L., p. 815, sec. 66.

As applied to the facts of the record, we think the correct general position is stated in *People, ex rel., v. The Newburgh Plank Road Co. et al.*, 86 N. Y., 117, as follows: "A local act is one operating only in a limited territory or specified locality. It could not be said with propriety that a territory comprising nearly the whole State was merely a place or locality. An act operating upon persons or property in a single city or county, or in two or three counties, would be local. But how far must its operation be extended before it ceases to be local? To determine this, no definite rule can be laid down, but each case must depend upon its own circumstances." The same case is authority for the position "that a general act does not cease to be general because an amendment bringing one or more additional counties under its provisions, but the act, as amended, continues to be a general act," and for the purposes now presented may be treated as if reënacted in its amended form. There are various decisions on this subject which appear to conflict, and some of them which do conflict with the disposition we have made of the present appeal. In some of them the courts were construing a Constitution which was much more specific in defining the term local than in the clause presented here, as in *State ex rel. Attorney-General v. Sayre, as Judge, etc.,* 142 Ala., 641, where a local law is expressly defined to be "any political division or subdivision of the State less than the whole." In others, an act in general terms contained a provision that the same should apply only to one or more counties, not designated expressly by name, but so described as to be clearly indicated, a palpable attempt to evade the constitutional restriction. Again, acts applying to the State at large, and excepting one or more counties, has been held local, because it is considered as legislation affecting the excepted counties. Although many of the decisions referred to might thus be distinguished, it must be admitted that they are based in the main on principles at variance with our present decision, but we are of opinion, as stated, and so hold, that on the case we have before us, where the Legislature, in the plain endeavor to comply with the constitutional limitation, has passed an act establishing a general statute for the establishment of these courts, applicable to more than one-half the counties in the State, the principle of the New York decision affords a better and wiser rule of interpretation, and must be allowed as controlling on the validity of the present law.

For the reasons stated, we are of opinion that the petitioner is held under a valid sentence of a competent court, and the judgment denying his application for release must be

Affirmed.

CLARK, C. J., concurring in result: It is well settled that a statute may be constitutional in part and unconstitutional in part. It is not necessary to cite authorities for this.

The amendment to the Constitution adopted in 1916, now Article II, section 29, prohibits local legislation on many subjects, among them "the establishment of courts inferior to the Superior Court," and requires that all legislation on the subjects named in that section shall be enacted by general laws. Laws 1919, ch. 277, entitled "An act to establish a uniform system of recorders' courts for municipalities and counties in the State," is in strict accordance with the amendment, and constitutional. It is a carefully prepared system, and by its terms applies to the whole State. It gives the same power to establish these courts in all of the 100 counties of the State.

But section 64 of said act, now C. S., 1608, which attempted to withdraw 44 counties from the provisions of the general act, is in violation of Article II, section 29, and unconstitutional and void.

The act here in question, Laws 1921, ch. 110, simply withdrew Iredell, Granville, and Cherokee from being among the 44 counties attempted to be excepted from the valid general act, Laws 1919, ch. 277, establishing a uniform system of recorders' courts.

As the provision excepting the 44 counties was unconstitutional, this act withdrawing these counties from the excepted class was a work of supererogation and unnecessary, but constitutional, and the recorder's court in Iredell is valid.

I do not understand that section 29, Article II, of the Constitution invalidates any local legislation, on any subject, which had been enacted prior to the adoption of the amendment.

J. D. WILSON ET AL. v. BOARD OF COMMISSIONERS AND BOARD OF EDUCATION OF BUNCOMBE COUNTY.

(Filed 2 June, 1922.)

1. **School District—Bonds—Taxation—Statutes—Substantial Compliance.**

Where the provisions of a Public-Local law have been strictly complied with as to consolidating the school districts of the county, for acquiring school sites, building and repairing schoolhouses thereon, and for an issuance of bonds therefor, upon the petition of one-fourth of the voters of the consolidated school district to the county commissioners, endorsed by the board of education, except that the petition was signed before the order of consolidation had been made, the signing of this petition beforehand, and presented as the statute required, is not of the substance, and will not alone render invalid the bonds issued upon the approval of the voters of the consolidated district.

2. School Districts—Statutes—Special Statutes—Exceptions to General Laws.

Where the provisions of a special statute, authorizing the consolidation of school districts within the county, have been complied with, objection to the validity of the issue on the ground that the order for the election was too indefinite as to specifying the amount of interest to be paid thereon under the requirement of our general statutes, C. S., 5676 *et seq.*, is untenable, for both the local and the general law having been passed at the same session of the Legislature, and being in force at the same time, the local law will prevail as an exception to the general law.

APPEAL by plaintiffs from *Shaw, J.*, at the February Term, 1922, of BUNCOMBE.

Civil action, heard on return to preliminary restraining order. The action, instituted by plaintiffs, citizens and residents of Swannanoa Consolidated School District, in said county, seeking to restrain defendants from making a bond issue of $50,000 of said district, pursuant to an election of the voters, and under Public-Local Laws 1915, ch. 722. There was judgment dissolving the restraining order, and plaintiffs excepted and appealed.

Carter, Shuford & Hartshorn for plaintiffs.

J. D. Murphy, Charles N. Malone, G. A. Thomasson, and G. H. Grainstaff for defendants.

HOKE, J. Public-Local Laws 1915, ch. 722, authorizes the board of education to consolidate any school district of the county, for the purpose of acquiring sites, building and repairing schoolhouses, etc., and it is provided in the act that on petition filed by as many as one-fourth of the voters of any school district, endorsed by the board of education, the county commissioners may call an election on the question of issuing bonds, and if the measure is favored by a majority of the qualified voters in the district, may issue and sell the bonds to the amount designated with interest, not to exceed 6 per cent, the proceeds to be applied to the purposes specified, etc. It is also enacted that a tax may be annually levied to meet the interest and provide a sinking fund to pay said bonds at maturity. Pursuant to the statute and proceedings under it, the board of education consolidated four existing school districts of the county into the Swannanoa Consolidated School District, and on 3 October, 1921, a petition, signed by more than one-fourth of the consolidated district properly endorsed, was filed for the proposed bond issue of $50,000, an election was ordered, the measure approved by the voters and the bonds prepared and will be sold unless restrained, etc. The provisions and requirements of the act have in all things been substantially complied with, and we find no legal reason suggested against the validity of the proposed bond issue. It is objected, first, that the petition was signed by the voters before the order for consolidating the four districts had been formally entered. It is recognized that the petition in a matter of this kind is jurisdictional, and the requirements concerning it must be substantially complied with. *Key v. Board of Education,* 170 N. C., 123; *Gill v. Comrs.,* 160 N. C., 176. It appears, however, that the boundaries of the consolidated district were fully known, and the petition was duly signed by the required number of voters a short while preceding and with the view of the proposed measure, and presented to the board of commissioners properly approved by the county board of education after the consolidation was made, and in such cases we are of the opinion that the mere fact that the signatures of the voters of the four districts were had before the order of consolidation formally entered is not of the substance, and presents no legal exception to the measure. Again, it is contended that the order for the election lacks definiteness, in that the amount of interest, etc., of the bond issue was not specified in accord with the requirements of the general law on the subject. C. S., 5676, 5677, 5678, 5679, etc., but the exception cannot be sustained. These sections do not seem to apply to the measure as presented on the facts of the record, and if they did, and there is conflict between the general and the special law, both passed at the same session, it is the latter which must prevail. *Bramham v. Durham,* 171 N. C., 196. And, moreover, the entire matter being throughout entered upon and conducted under the special statute. It is the provisions of such statute that must prevail, the same being in force as an exception to the law of more general application. *Proctor v. Comrs.,* 182 N. C., 56. On the record, we fully concur in the conclusion of the learned judge who considered and passed upon the question presented "that defendants have in all respects fully complied with Public-Local Laws of 1915, ch. 722, in holding and conducting the special election in said school district authorizing the $50,000 of school bonds mentioned in the pleadings, and that the said election has been legally and regularly held and conducted, and that the said bonds authorized by said election constitute the legal, valid, and binding obligations of said Swannanoa Consolidated School District, when the same shall have been duly issued," and are of opinion that the restraining order has been properly dissolved.

Affirmed.

S. E. COVER ET AL. v. H. M. MCADEN ET AL.

(Filed 2 June, 1922.)

1. **Covenants—Deeds and Conveyances—Seizin—Warranty of Title—Breach of Covenant—Paramount Title.**

A covenant of seizin in a conveyance of lands is that the particular state of things, the subject thereof, exists *in præsenti*, and if untrue at the time of the delivery of the deed, it is an instant breach of the covenant, which differs from a covenant of warranty, for the latter is an assurance by the grantor of an estate that the grantee and his heirs and assigns shall enjoy without interruption by virtue of a paramount title, or that by force of a paramount title they shall not be evicted from the land or deprived of its possession; and being prospective, it is broken only by eviction, actual or constructive, under a paramount title existing at the time the conveyance was made.

2. **Covenants — Deeds and Conveyances — Warranty—Title—Breach of Warranty—Damages.**

The modern law differs from the ancient common law of England whereunder the lord, upon breach of his warranty, was required to give his vassal another *fief* of equal value, etc., and by modern interpretation the warranty of title is treated as an agreement of the warrantor to make good by compensation in money any loss directly caused by failure of the title which his deed purports to convey.

3. **Same—Notice to Covenantor—Judgments—Prima Facie Case—Paramount Title—Evidence—Proof.**

Where the covenantee of title to lands has been evicted therefrom by the owner of a paramount title, and his covenantor has not been notified to come in and defend, and has not been made a party to the action, the covenantee in his action on the warranty of title, does not make out a *prima facie* case by showing judgment and eviction, for he is required to show, in addition, that he had been evicted under a paramount title.

4. **Same—Eviction—Ouster.**

The covenantee in a deed for lands was evicted therefrom in an action by the owner of a paramount title, and his grantor, having made good his warranty by compensation, sued the covenantor in his deed to recover upon the breach of warranty therein. It was found as a fact that the defendant in the present action had been given due notice of the former action, with opportunity to defend the title, and upon the record and the facts found *it is held*, he was bound by the judgment in that action, establishing the paramount title in another at the time of the delivery of his deed to the present plaintiff.

5. **Same—Government.**

While ordinarily there must be an eviction, actual or constructive, though not necessarily under legal process, for the covenantee to bring his action upon his grantor's breach of warranty of title, it is not essential to a constructive conviction that the paramount title be formally asserted when such title is in the State or United States Government at the time of the delivery of the deed containing the warranty.

6. Same—Possession—Trespass—Limitation of Actions.

Where, at the time of the conveyance of lands with warranty of title. the paramount title is in the United States Government, the paramount title of the United States was such hostile assertion as amounted to a constructive eviction; and the statute of limitations began to run at the time of the delivery of the deed, C. S., 437 (2); and where neither the Government nor the parties have been in actual possession, it is not required that the covenantee or grantee in the deed enter upon the lands as a wrong-doer, and become liable to summary ejection in order to recover upon the warranty.

7. Appeal and Error—Facts Found by Trial Judge—Covenants—Breach—Deeds and Conveyances—Judgments.

The plaintiff's covenantee was sued by the United States Government to recover certain lands alleging paramount title by prior deeds, of which the plaintiff and defendant in the present action for breach of warranty had notice, but neither became parties; and it was found by the trial judge who the parties to the present action agreed should find the facts on the evidence, that the plaintiff and defendant were precluded by the former judgment: *Held*, upon the facts found it was not open for the defendant to contest the validity of the probates to the deeds under which the Government claims, and under which it has established its paramount title in the former action, in view of the decision of *Fibre Co. v. Cozad*, *ante*, 600.

CLARK, C. J., dissenting.

APPEAL from *Shaw, J.*, at April Term, 1922, of BUNCOMBE, the cause having been removed from CHEROKEE by consent.

Civil action to recover damages for alleged breach of warranty title. The parties waived a trial by jury, and agreed that the court, after hearing the evidence and the argument, should answer the issues. The plaintiff introduced in evidence the following:

1. A deed from Edwin B. Olmsted and wife to Levi Stevens, dated 7 February, 1868, purporting to convey about 5,000 acres of land in Cherokee County.

2. A deed for the same land from Levi Stevens and wife to the United States of America, dated 15 March, 1869.

3. An agreement between J. H. McAden, trustee, and F. P. Cover, dated 29 October, 1902, by which McAden was to sell and Cover was to buy certain tracts in Cherokee and Clay, containing several thousand acres.

4. A deed, with several, but not joint, covenants of warranty, from H. M. McAden and others to S. E. Cover and others, dated .... February, 1905, executed in pursuance of said agreement.

5. A deed, with the usual covenants of warranty, from S. E. Cover and others to the Hiawassee Lumber Company, conveying the land described in the deed from McAden to Cover. It was admitted that the

plaintiffs are the children of F. P. Cover. It is not necessary to refer particularly to the orders making additional parties, or to the special proceedings for the sale of the interest of minors.

Plaintiffs introduced, also, a judgment of the District Court of the United States for the Western District of North Carolina, rendered at March Term, 1919, in an action entitled *"United States v. Hiawassee Lumber Company,"* adjudging that the plaintiff in that action was the owner of the land conveyed in the Olmsted and Stevens deeds. This is a part of the land conveyed by McAden and others to the Covers, and by the Covers to the Hiawassee Lumber Company.

The plaintiffs alleged that the United States was seized in fee of the land described in grant No. 3110 at the date of the deed from McAden and others to the Covers, and that the makers had no title to convey, and that after the District Court adjudged the United States to be the owner of this land, the plaintiffs paid to the Hiawassee Lumber Company the amount received as the purchase price, with interest at 6 per cent from date of receipt to date of payment, namely 22 May, 1919. The plaintiffs have sued to recover $5,922, with interest. His Honor answered the issues, finding that defendants, except the minors, covenanted to warrant and defend the title to the lands described in the complaint; that title vested in the United States by virtue of the Olmsted and Stevens deeds; that the plaintiffs and defendants had notice of the action of the United States against Hiawassee Lumber Company; that plaintiffs accounted to the Hiawassee Lumber Company for the loss caused by its breach of warranty; that the judgment of the District Court and plaintiffs' settlement with Hiawassee Lumber Company constituted an ouster, and assessed certain damages. His Honor answered the seventh issue as follows:

"Is the cause of action of the plaintiffs barred by the statute of limitations, as alleged in the answer? Answer: Yes, the court being of the opinion that plaintiffs are estopped by reason of the judgment in United States Circuit Court in the case of *United States v. Hiawassee Lumber Company* to deny that their cause of action arose upon the execution of the deed to them by the defendants in 1905; and the court further is of the opinion, and so holds, that under the judgment above mentioned the title to the lands in controversy, insofar as plaintiffs and defendants are concerned, was in the United States, and the plaintiffs and defendants having neither of them been in the actual possession of any part of said property that the plaintiffs' cause of action arose immediately upon the execution and delivery of the said deed to them by the defendants."

Judgment; all parties appealed.

Martin, Rollins & Wright for plaintiffs.
Tillett & Guthrie for defendants.

ADAMS, J. The United States acquired its title on 15 March, 1869. In February, 1905, McAden and his cotenants executed their deed to the Covers, and on 17 May, 1906, the Covers made a conveyance to the Hiawassee Lumber Company, reserving certain timber and minerals, with right of entry for purposes designated in the deed. On 19 August, 1910, the United States brought suit against the Hiawassee Lumber Company in the District Court for the Western District of North Carolina, and at the March Term, 1919, recovered a final judgment declaring the plaintiff in that action to be the owner of the land in controversy. In answer to the fourth issue his Honor concluded that the District Court had adjudged the United States to be the owner of 2,632 acres of the land embraced in the deed executed to the Covers by McAden and his cotenants. This land was included, also, in the deed from the Covers to the Hiawassee Lumber Company. After rendition of the final judgment in the District Court, the plaintiffs refunded to the Hiawassee Lumber Company the consideration received by them and their predecessors, with interest from the date of payment, and on 16 December, 1919, instituted the present action to recover of the defendants the sum of $5,922, the amount refunded, with interest thereon from 1 March, 1905, as damages for the defendants' alleged breach of warranty. Among other defenses, the defendants pleaded the statute of limitations in bar of the plaintiffs' recovery; and this plea necessarily involves the preliminary question whether the plaintiffs' alleged cause of action is defeated by lapse of time.

In view of the plaintiffs' contention, it may be advisable to note the distinction between a covenant of seizin and a covenant of warranty. The former is a covenant *in præsenti*, or a covenant that a particular state of things exists when the deed is delivered—*juris et seisinæ conjunctio*—and if it does not exist the delivery of the deed containing such a covenant causes an instant breach. A covenant of warranty is prospective. It is an agreement or assurance by the grantor of an estate that the grantee and his heirs and assigns shall enjoy it without interruption by virtue of a paramount title, or that they shall not by force of a paramount title be evicted from the land or deprived of its possession Rawle on Covenants, sec. 205; Burdick on Real Prop., sec. 301; *Wiggins v. Pender*, 132 N. C., 634. This distinction is further observable in the conditions or circumstances that usually characterize the breach of each covenant. If the grantor is not seized, or if an encumbrance exists, the covenant of seizin is broken immediately upon the execution of the deed but generally speaking, a covenant of warranty, being prospective in its nature, is broken only by eviction, actual or constructive, under a paramount title existing at the time the conveyance is made. Burdick, *supra*, 814; *Wiggins v. Pender, supra; Price v. Deal*, 90 N. C., 290; *Coble v.*

Wellborn, 13 N. C., 388; *Britton v. Ruffin,* 123 N. C., 67; *Griffin v. Thomas,* 128 N. C., 310; *Cedar Works v. Lumber Co.,* 161 N. C., 614.

We must, therefore, inquire whether at the time the plaintiffs and the defendants executed their respective deeds there was a paramount title in the United States, and if so, whether the Hiawassee Lumber Company, after vouching in the plaintiffs, was actually or constructively evicted from any part of the purchased premises by virtue of such title. Although there is no contention that the judgment of the District Court does not conclude the Hiawassee Lumber Company, it is necessary to decide whether it likewise concludes the plaintiffs. The answer depends in part on the question of notice and the relation existing between the plaintiffs and the Hiawassee Lumber Company at the time the judgment was rendered. At common law the lord, when vouched in or notified, was required to appear and protect his vassal in the enjoyment of his fief, and, failing to do so, to give to the vassal another fief of equal value. If the warrantor had no lands or tenements, and if there was neither voucher nor writ of *warrantia chartæ* (warranty of deed or title), there could be no recovery in value; but in the modern law a covenant of warranty is treated as an agreement of the warrantor to make good by compensation in money any loss directly caused by failure of the title which his deed purports to convey. It is not always essential to the grantee's right of action on the covenant that he should give his covenantor notice to come in and defend the title. But if no notice is given, the covenantee, in his suit against the covenantor for breach of warranty, does not make out a *prima facie* case by showing judgment and eviction; he must show, in addition, that he was evicted under a paramount title, unless the covenantor was a party to the suit that brought about the eviction. 15 C. J., 1265, sec. 97. In *Jones v. Balsley,* 154 N. C., 68, *Walker, J.,* approved the doctrine stated in *Carroll v. Nodine,* 41 Oregon, 412, to this effect: "Before an indemnitor can be expected to defend, he must have reasonable notice of the pendency of the suit or action by which he is to be bound, and afforded an opportunity to participate in or interpose such defense as he may desire; and it is only by complying with such conditions that the party to be indemnified can estop the indemnitor to controvert the matter anew in an action against him upon the indemnity contract or obligation." True, in *Martin v. Cowles,* 19 N. C., 101, approved in *Wilder v. Ireland,* 53 N. C., 85, it was held that a judgment in ejectment against the vendee is no evidence of a defect in the title of the vendor, when the latter is sued upon his covenant by the former; but *Justice Walker* observed that these cases were decided under the system of pleading, practice, and procedure prevailing at common law, when the ejectment suit was regarded with respect to the covenantor as *res inter alios acta,* and he could not for that reason become a party to it. The learned justice remarks, also, that the great weight of authority in England and in this country is to the effect that it is sufficient to conclude the vendor by the judgment if he is made constructively a party by substantial notice to come in and defend his title, and that it is not necessary that he be actually a party to the suit. *Jones v. Balsley, supra,* 69. Answering the third issue, his Honor found as a fact that both the plaintiffs and the defendants had been given due notice of the action prosecuted by the United States against the Hiawassee Lumber Company and an opportunity to defend the title, and that they were bound by the judgment in that action. We hold, therefore, that the plaintiffs have shown, for the present purpose, an outstanding paramount title to the lands recovered against the Hiawassee Lumber Company in the District Court.

We are next concerned with the question whether the plaintiffs have shown an eviction under this title. In *Shankle v. Ingram,* 133 N. C., 255, the plaintiff alleged that the defendant had conveyed to him 245 acres of land, with covenants of warranty; that the defendant had previously conveyed 41.8 acres of this land to Jesse Reynolds; that Reynolds was in possession of his tract, holding adversely at the time the plaintiff acquired his deed. Upon plaintiff's suit for breach of warranty, it was said that since Reynolds held adverse possession under a good title at the time the plaintiff received his deed, such adverse possession was equivalent to an ouster. If the plaintiff had entered upon the possession of Reynolds he would have committed a trespass; and in *Coble v. Wellborn, supra, Ruffin, J.,* said: "No man is compelled to be a trespasser, and, therefore, when it has been judicially ascertained that another is in better title, it follows that he is kept out; which is equal to being turned out." *Grist v. Hodges,* 14 N. C., 200; *Wiggins v. Pender, supra.* The immediate question, then, is this: At the date of the deed executed by the plaintiffs to the Hiawassee Lumber Company, were the circumstances under which the United States held title tantamount to a constructive eviction of the plaintiffs' grantee? In effect, the final judgment of the District Court was an adjudication that the United States acquired its title under the Stevens deed before the execution of the McAden deed or plaintiffs' conveyance to the Hiawassee Lumber Company. It is admitted that none of the grantors or grantees in the deed from the McAdens to the Covers ever had actual possession of the land therein described, and that the Hiawassee Lumber Company never had actual possession of the land embraced in its deed from the Covers. Nor was the United States in the actual occupation. Ordinarily the mere existence of an outstanding paramount title to land will not authorize a recovery by the grantee in an action for breach of the covenant. There must be an eviction, actual or constructive, but not necessarily under legal process. 15 C. J., 1288, sec. 157 (b); *Coble v. Wellborn, supra; Price v. Deal, supra; Hodges v. Latham,* 98 N. C., 240; *Britton v. Ruffin, supra; Ravenal v. Ingram,* 131 N. C., 549. In other words, to warrant recovery there must be some hostile assertion of the adverse title, unless the superior title is in the State. 15 C. J., 1288, sec. 157. But the authorities hold that where the paramount title is in the State or the United States it is not essential to a constructive eviction that such title be formally asserted. "A grantee by a warranty deed executed by a private person to lands owned by the United States cannot take possession without becoming a wrongdoer, and is not required to take or attempt to take possession, and his right of action accrues immediately to recover for a breach of warranty not dependent on eviction or any future event." 7 R. C. L., 1151, sec. 63. In *Crawford County Bank v. Baker* (Ark.), 130 S. W. R., 557, *McCulloch, C. J.,* said: "It is well settled in this State and elsewhere that when the title to land is in the State or the United States, that of itself is such a hostile assertion of the paramount title as will amount to a constructive eviction, sufficient to authorize a purchaser to maintain an action against his vendor for breach of the covenants of warranty." *Seldon v. Dudley Jones Co.,* 85 S. W. R., 778; *Dillahunty v. Ry.,* 59 Ark., 629; Rawle on Covenants, sec. 140; 2 Tiffany on Real Property, 1701 (n); Compiled Sts., sec. 4980. In *Pevey v. Jones,* 71 Miss., 647, *Campbell, C. J.,* discussing the question, said: "As to the land belonging to the United States, the covenant of warranty was broken the instant it was made, and a right of action on it then accrued, and was barred when this action was commenced. The true doctrine is that the United States are always seized of their lands, and cannot be disseized as private owners may be; that land belonging to the United States cannot lawfully be the subject of sale and conveyance by individuals, so as to confer any right; that a grantee of such land by another than the United States cannot take possession without becoming a wrongdoer, and liable to summary ejection; and, therefore, that a covenant of warranty, in a conveyance of land belonging to the United States, must be viewed differently from one where the ownership is by a private person; that the grantee is not required to take possession, or to attempt to get it, and that a right of action immediately accrues to recover for a breach of the warranty, not dependent on any future event, but fixed by the fact of ownership of the land by the Government. In this case the grantee acquired nothing whatever as to the land owned by the United States; and, by virtue of the transaction, his vendor, on receipt of the purchase money, thereby at once became liable to him for money received to his use. We are not aware of any direct authority for this view, but it seems to result necessarily from what is well settled, and we do not hesitate to make a precedent so fully supported by reason."

Applying these principles, we conclude that neither the plaintiffs nor the defendants had title to the land when their respective deeds were executed, that the paramount title of the United States constituted such hostile assertion as amounted to a constructive eviction, and that the plaintiffs' alleged cause of action accrued at the time of the ouster. Since the summons was issued on 16 December, 1919, it follows that the plaintiffs' action is barred by the statute of limitations. C. S., 437 (2).

In view of the decision rendered at this term in *Fibre Co. v. Cozad, ante,* 600, we deem it proper to remark that we are not inadvertent to the probate of the Olmsted and Stevens deeds. While the probate of these deeds may be subject to the criticism set forth in that decision, we need not consider the question here, for his Honor concluded from the evidence that the plaintiffs and the defendants were bound by the judgment of the District Court. From this finding it results that the parties to this action are precluded from contesting the validity of the probate.

The judgment of his Honor is

Affirmed.

CLARK, C. J., dissenting: J. H. McAden, trustee under the will of R. Y. McAden, on 29 October, 1902, entered into a contract with F. P. Cover to convey certain tracts of land in Cherokee and Clay counties. Before the deed was executed, both parties having died, under a proceeding instituted in Cherokee, judgment was entered decreeing that defendants herein convey to S. E. Cover and others, heirs of F. P. Cover, the plaintiffs herein, the said land at the price agreed upon of $2.25 per acre (which was paid 1 March, 1905), and the defendants, in their deed to plaintiffs, severally but not jointly, covenanted that the grantors were seized in fee of said land, have good right to convey the same in fee, that there were no encumbrances thereon, and that they would "warrant and defend the title against the lawful claims of all persons whatsoever."

On 17 May, 1906, the heirs of F. P. Cover, grantees in the deed above referred to, and the plaintiffs in this action, conveyed the said land, with exactly the same covenants, to the Hiawassee Lumber Company. At the date of the aforesaid mentioned deed neither of the parties were in actual possession of the lands herein referred to. On 19 August, 1910, the United States brought action in the Circuit Court of the United States for the recovery of a certain part of said land, and the case was ultimately carried to the Supreme Court of the United States by appeal, and a final judgment in favor of the United States was entered 11 March, 1919, which adjudged that the United States recover of the said Hiawassee Lumber Company the 2,632 acres in controversy, and which had been conveyed by the defendants to the plaintiff. On 17 March, 1919, the Hiawassee Lumber Company demanded of the plaintiffs a return to it, with interest, of the amount of money which it had paid to the plaintiffs for the land.

On 10 April, 1919, the plaintiffs demanded of the defendants the repayment of the sum of $2.25 per acre, with interest from the date of the payment thereof, as purchase money, which had been paid by the plaintiff to the defendant for the said 2,632 acres. This demand was repeated in a letter of 25 April, 1919. On 6 May, 1919, the defendants acknowledged receipt of these two letters, and on 8 May they were again called upon for payment, to which their attorney made reply on 15 May, that the plaintiffs had no right to claim anything from the defendants until the plaintiffs had paid the Hiawassee Lumber Company its loss. Thereupon, on 23 May, 1919, the plaintiffs paid to the Hiawassee Lumber Company said sum and took their full receipt therefor with interest. Notice of such payment was given to the defendants on 23 May, 1919, and demand made that they reimburse the plaintiffs. The defendants refused to reimburse the plaintiffs for the purchase money paid by them, and this action was brought 11 December, 1919. It was admitted on the trial that the plaintiffs in this action had succeeded to all the rights of the heirs of F. P. Cover to recover of the defendants on their warranty in the deed of February, 1905, and that the lands recovered by the United States in the case against the Hiawassee Lumber Company were a portion of the lands conveyed by the defendants to the plaintiffs by above deed of February, 1905, and that neither the grantors in the deed from the McAdens to the Covers and none of the grantees in said deed ever had actual possession of the lands covered by the deed.

The sole defense was the statute of limitations. The Hiawassee Lumber Company, grantee of the plaintiffs, having lost the land in question under a decree of the United States Supreme Court, and the plaintiffs having reimbursed said lumber company for said loss under their warranty, and neither the defendants nor plaintiffs having been in possession at the time of the conveyance in 1905, it would seem unnecessary to discuss the liability of the defendants upon the warranty set out in the deed from them to the plaintiffs that "they had a good right to convey the land in fee, that there was no encumbrance thereon, and they would warrant and defend the title to their grantees," and that in justice and in equity the defendants should be decreed to make good the purchase money they received in 1905 of $2.25 per acre on the 2,632 acres, and interest.

The statute of limitations is based upon the equitable principle that parties who have slept upon their rights are not entitled to recover, but in this case there has been no delay.

The plaintiffs had no notice of any defect in the title, and thought themselves secure, and in good faith relied upon the warranty given by the defendants. There was nothing to put them on guard, neither party was in possession, and there was no eviction until the recovery of the land by the United States. The defendants then refused to pay until the plaintiffs had reimbursed the lumber company, and after this was done, on demand of repayment, the defendants refused, and this action was promptly instituted. The defendants having conveyed to the plaintiffs property to which they had no title, and having received money therefor, should reimburse the plaintiffs. This action was brought within less than a year after their *mesne* grantee was evicted by the true owner of the title.

There could certainly be no action on a warranty to defend until there was an eviction, or some act which amounted to an eviction. In this case there was also a covenant of seizin at the time the deed was made, and under some authorities the plaintiff would have been barred in a suit solely on such covenant, but in this case the action is brought on the covenants of warranty and for quiet enjoyment on which an action could not arise until there was an eviction or disturbance of the plaintiffs or their grantee in their right to possess the land. This occurred only after the judgment rendered against the Hiawassee Lumber Company of eviction from the lands, and it was adjudged that the title was in the United States. The statute of limitations, therefore, did not begin to run until the entry of that judgment.

In 15 Corpus Juris., 1298 (sec. 187), the doctrine is thus stated: "The right of action for a breach of covenant accrues at the time of the breach, and the statute begins to run from that time and not from the time of execution of the covenant," citing a large number of authorities from many states and countries.

In 7 R. C. L., 1186, the same doctrine is thus stated: "It is well settled that the statute of limitations begins to run against an action for breach of warranty only from the time of actual or constructive eviction. Where, however, a superior title is outstanding in the third person, at the time of the execution of the warranty deed, the covenants of the deed are broken when that title is actually asserted and the covenantee is obliged to surrender possession so that the statute of limitations commences then to run rather than from the date of the delivery of the deed."

The Hiawassee Lumber Company was obliged to yield to the title of the United States by the judgment of the Court in 1919, and immediately the right of action against the defendants arose and the statute of limitation then began to run, and not before. "In an action for breach of warranty, the question of action does not arise until there is an ouster." *Mizzell v. Ruffin,* 118 N. C., 69.

In *Wiggins v. Pender,* 132 N. C., 640, this Court said: "The plaintiffs' cause of action is not barred by the statute of limitations. It did not occur until there was an eviction which took place in 1901, and the statute does not commence to run until the right of action has accrued."

In 13 Anno. Cas., 700, the law is thus stated: "It is well settled that the statute of limitations begins to run against an action, brought for a breach of warranty, only from the time of actual or constructive eviction," citing a large number of cases, among them *Flowers v. Foreman,* 23 Howard, 183; *Mizzell v. Ruffin, supra; Wiggins v. Pender, supra,* and *Shankle v. Ingram,* 133 N. C., 254.

In *Flowers v. Foreman, supra,* the United States Supreme Court said: "The cause of action accrues on a covenant of warranty when a judgment of eviction is rendered or when the defendant in that suit paid the money to satisfy the successful party in that suit."

The authorities to the above effect are so numerous that we will not add any more, but will merely advert to the fact that if, as the defendants contend, the possession of lands belonging to the Government confers no right upon the possessor, no lapse of time should confer immunity upon a warrantor. Any other view would certainly work a great injustice in all such cases. It is difficult to see how the plaintiffs had a cause of action on the warranty to defend the title until the Government made its claim. Undoubtedly, if the plaintiffs had brought suit on the warranty to defend title before the Government made claim to the land, they would have failed in their action because their right to possession under the deed from the defendants had not been disturbed. All parties assumed that the lands belonged to the defendants, who warranted title and covenanted that they would defend it, and the title was not questioned by anybody until the Government brought suit in 1910.

The defendants should make good to the plaintiffs the money which the defendants received for the land, with interest, when they received notice that their grantees, the plaintiffs, had been compelled to make good under the same warranty to the lumber company, who had been evicted by the judgment of the Court in favor of the United States. It seems that the defendants themselves were of this opinion, for when payment was first demanded, their only objection, then, was that the plaintiffs had not then paid in full the Hiawassee Lumber Company, their own grantee.

The right of the plaintiffs to recover the purchase money paid by them to the defendants rests upon the soundest principles of justice which cannot be defeated by reference to minute technicalities in the complicated procedure under the Feudal System so long ago (1660) happily abolished by the statute, 12 Charles II.

CHARLES U. MILLER v. J. T. GREEN AND J. T. GREEN LUMBER COMPANY.

(Filed 2 June, 1922.)

1. **Contracts—Written Instruments—Interpretation—Intent.**

The intent of the parties is the proper guide in the interpretation of written contracts, ordinarily ascertained from the words employed therein, when not in contravention of other legal principles controlling in its correct interpretation.

2. **Same—Ambiguity—Parol Evidence.**

Where the intention of the parties to a written contract has been clearly expressed, it may not be contradicted by parol evidence, for therefrom the meaning of the contract must be deduced; but where a latent ambiguity as to such intent arises from the language employed not being clear and unequivocal, the preliminary negotiations and surrounding circumstances may be shown and considered in determining the intent of the parties.

3. **Same—Extraneous Facts.**

In the interpretation of a written contract a latent ambiguity may arise where the language therein used is plain, but the application of the words employed is found impracticable by reason of extraneous facts which should be considered in ascertaining what the parties actually intended.

4. **Same — Consignment — Principal and Agent—Questions for Jury—Trials—Instructions.**

The defendant, a dealer in lumber, had orders therefor from foreign customers, and in turn contracted with the plaintiff to supply it at a certain price per thousand feet, to be reconsigned to the defendant's customers, upon express provision that upon payment by the consignee the defendant should receive $10 for each thousand feet, "terms of reconsignment 80 per cent draft with bill of lading; balance upon arrival of goods": *Held*, the language of the written contract was ambiguous as to whether the contract was one of consignment or a direct sale to the defendant, in plaintiff's action to recover the purchase price, leaving for the determination of the jury, under the evidence and proper instructions from the court, whether the defendant was the agent or vendee of the plaintiff.

APPEAL by defendant from *Brock, J.*, at January Term, 1922, of HAYWOOD.

Civil action, tried on 21 April, 1920, the defendants and the Kroeler Manufacturing Company made the following contract:

J. T. GREEN LUMBER COMPANY, Tryon, N. C.
KROELER MANUFACTURING COMPANY, Naperville, Ill.

Shipping information given from Naperville 80% draft attached. At once.

J. E. KOCHA.

We agree to sell and ship to Kroeler Manufacturing Company, of Naperville, Ill., oak lumber, all contents of logs that will make No. 2 common and better, thickness 4/4, 5/4, and 8/4.

Amount this year approximately 200 thousand feet at $90 per thousand, f. o. b. Tryon, N. C., each thickness to be separate in car.

National Hardwood Manufacturing Association. Inspection accepted to both parties.

[SEAL.] J. T. GREEN LUMBER COMPANY.
J. T. GREEN.
[SEAL.] KROELER MANUFACTURING COMPANY,
By J. E. Kocha.

On 8 October, 1920, the plaintiff and the defendants contracted as follows:

"This contract, made this 9 October, 1920, by and between the J. T. Green Lumber Company, Tryon, N. C., and C. U. Miller, of Waynesville, N. C.

"Witnesseth, that the said C. U. Miller agrees to ship to said Green Lumber Company, at Tryon, N. C., within the next seventy days, approximately 125,000 feet of oak lumber; same to be the full contents of all logs that will make No. 3 common and better.

"Said C. U. Miller agrees to pay one-half freight charges on lumber from shipping point to Tryon, N. C.

"It is further agreed that all shipments must be accompanied by a National Hardwood Inspector's tally sheet.

"All lumber received from said C. U. Miller is to be reconsigned by Green Lumber Company from Tryon, N. C., to customers in Illinois of said Green Lumber Company, on contract dated 21 April, 1920, at $90 per M., f. o. b. Tryon, N. C.

"Upon payment of invoice by consignee in Illinois, said Green Lumber Company is to receive $10 for each thousand feet. Terms of reconsignment, 80 per cent draft with bill of lading; balance upon arrival of goods."

Plaintiff alleged that defendants agreed to buy 125,000 feet of lumber and pay plaintiff therefor $80 per thousand, and that plaintiff shipped three cars of lumber for which the defendants were indebted to him in the sum of $2,737.76. The written contract of 8 October was admitted, but the parties differed as to its construction. The plaintiff contended that it was a contract of sale, and the defendant that it was a consignment. His Honor instructed the jury that it was a contract of sale to the defendants. The issues were answered in favor of plaintiff. Defendants excepted and appealed.

J. W. Ferguson and Morgan & Ward for plaintiff.
Smith & Arledge and W. J. Hannah for defendants.

ADAMS, J. Where it can be ascertained and followed without contravening legal principles, the intention of the parties is ordinarily accepted as the proper guide in the interpretation of contracts. If the contract is ambiguous words cannot be supplied which import an intention not expressed when the contract is made, for then the intention of the parties is to be deduced from the language employed; but if there is a latent ambiguity—if the contract is not clear and unequivocal—preliminary negotiations and surrounding circumstances may be considered for the purpose of determining what the parties intended—*i. e.,* for the purpose of ascertaining in what sense they used the ambiguous language, but not for the purpose of contradicting the written contract or varying its terms. A latent ambiguity may arise where the words of a written agreement are plain, but by reason of extraneous facts the definite and certain application of those words is found impracticable. *Hand v. Hoffman,* 8 N. J. L., 71; 6 R. C. L., 839, 841; Page on Contracts, sec. 2060 *et seq.; McMahan v. R. R.,* 170 N. C., 459; *Simmons v. Groom,* 167 N. C., 275; *Merriam v. U. S.,* 107 U. S., 441. Neither the plaintiff's agreement "to ship" nor the defendants' agreement to "reconsign" the lumber *ex vi termini* determines the nature of their contract. "In all cases it is held that the relation of the parties as principal and agent, or as vendor and vendee, is determined by the nature of the transaction, and not by the name which they give it, and the use of the words 'agent,' 'commissions,' etc., is of little significance. If the goods are delivered to the 'consignee' under such circumstances as to confer upon him absolute dominion over them, and he becomes bound to pay a stipulated price for them at a certain time, or upon the happening of any future event, the transaction amounts to a sale and delivery, and the title passes to him." *Buffum v. Descher,* 96 N. W. R., 352.

The last paragraph of the written agreement is susceptible of explanation by parol. Indeed, such explanation seems to be necessary. There is ambiguity as to the source from which the plaintiff was to derive his pay. It does not definitely appear, but it may be assumed that the bills of lading were sent by the defendant to the Kroeler Manufacturing Company, and that to each bill was attached a draft for 80 per cent of the contract price. The defendant was to receive $10 for every thousand feet. What was the intention of the parties as to the disposition of the remainder? Was the Kroeler Company to pay it to the plaintiff, or to the defendant? If to the plaintiff, was the Kroeler Company acting as purchaser from him or as the agent of the defendant? If to the defendant, as perhaps may be inferred, did the defendant receive payment as the seller of the lumber, or as the agent or broker of the plaintiff? The answer depends on the intention. As we read the record the evidence relating to these questions is apparently conflicting, and we think that an admission by the parties or a determination of the facts by the jury, is essential to a proper construction of the contract. When such intention with respect to the payments is ascertained, the question whether the contract is a consignment or a sale to the defendants may easily be determined. If no admission is made, it will be necessary for the jury to find the facts from the evidence and apply the court's instruction as to the law in finding ultimately whether the defendant was the agent or the vendee of the plaintiff.

For the reasons assigned, there must be a
New trial.

J. W. FARMER v. MRS. ED. BRIGHT.

(Filed 2 June, 1922.)

1. **Easements — Way of Necessity — Cartways — Statutes—Public-Local Laws.**

While, under the provisions of our general statute, C. S., 3836 *et seq.*, a petitioner who already has an outlet from his lands to a public road, reasonably sufficient for the purpose, is not allowed to have an additional or different cartway established merely because a shorter and better route can be shown, it may be otherwise when the petitioner has proceeded under the provisions of a special local law applicable to a certain county allowing it under certain conditions, the provisions of the local law controlling those of the general statute on the subject.

2. **Same—Counties—Petition—Evidence—Nonsuit—Questions for Jury—Trials.**

Where, under the provisions of a public-local law, the commissioners of a county, etc., upon petition, may cause a private cartway over the lands of an adjoining owner to be established upon sufficient reason shown: *Held*, the general law, C. S., 3836, is not applicable, and upon appeal by the petitioner from the refusal of the county commissioners to order the cartway made, it is error for the Superior Court judge to dismiss the action as of nonsuit upon the evidence, which, if accepted by the jury, would entitle the petitioner to have his cartway in accordance with the terms of the local statute applicable.

APPEAL by plaintiff from *Brock, J.*, at January Term, 1922, of HAYWOOD.

Proceedings to establish a cartway over lands of defendant, under Public-Local Laws 1921, ch. 291, heard on appeal from action by board of county commissioners dismissing the petition. At close of plaintiff's evidence, on motion, there was judgment of nonsuit entered against plaintiff, whereupon plaintiff excepted and appealed.

Alley & Alley and Morgan & Ward for plaintiff.
Grover C. Davis and W. J. Hannah for defendant.

HOKE, J. There was evidence on the part of plaintiff tending to show that he lived in Haywood County, one and a half miles east of Hazelwood, and that he had no public road and no cartway as of right leading out from his home to the public road. That he was using, by permission, a road over the lands of Frank Welch, Esq., which enabled him to reach a public road, but this was one mile further than the proposed cartway in reaching plaintiff's mill, church, schoolhouse, etc. That the proposed cartway to a public road, leading over defendant's land, had been used for fifty years for travel on foot and with vehicles, but it had never been laid off as a cartway, and there was doubt if it has been used as of right, and recently it had been closed to plaintiff by the owner, leaving him without a lawful or desirable outlet to the public road in the direction of his church, mill, and schoolhouse. There was evidence that a road led out to a public road towards the county site, but in an opposite direction to the one now petitioned for.

That the proposed cartway would be for 1,850 feet on plaintiff's own land, and only 750 feet on the lands of the defendant.

While a petitioner who already has an outlet to a public road, reasonably sufficient for the purpose, is not allowed to have an additional or different cartway established merely because a shorter and better route can be shown, we are of opinion that on the facts as they now appear of record, the plaintiff is entitled to have the question referred to a jury as to whether sufficient reasons exist for the proposed way. It will be noted that the proceedings are instituted under Public-Local Laws 1921, ch. 291, and not under the general statutes on the subject. C. S., 3836 *et seq.*

Under a similar special statute, and on substantially similar facts, the Court, in *Cook v. Vickers,* 144 N. C., 312, held that the question of whether sufficient reasons had been shown must be determined by the jury, having due regard for the rights of all persons interested in the matter, and we consider that case as decisive of the question as presented on this appeal.

The cases, referred to and relied upon by the appellee, of *Warlick v. Lowman,* 104 N. C., 403, and others, were decisions construing the general statute on the subject. It is not necessary now to determine whether the strict interpretation of the general statute as it prevailed in those authorities has not been modified by the rulings of *Cook v. Vickers, supra,* for, as stated, these proceedings are instituted under the local law, and the disposition of the case is controlled by the later decision.

This will be certified that the judgment of nonsuit be set aside and the question submitted to the jury.

Reversed.

JOHN TATHAM ET AL. v. W. M. DEHART, SHERIFF.

(Filed 2 June, 1922.)

1. **Attachment—Action—Sheriffs—Wrongful Levy—Property of Another.**
   In levying upon property in attachment, the sheriff is required to see that the property upon which he has levied is that of the defendant, and when he seizes the property of a stranger, it is a wrong done such third person, for which an independent action will lie; as to whether the owner of the property so seized could have resorted to an intervention or interpleaded in the attachment suit is not decided in this case.

2. **Same—Judgments.**
   In an independent action against a sheriff to recover damages for his wrongful seizure in attachment of the plaintiff's property, instead of that of the defendant therein, where the property has been sold, the proceeds of the sale represents the property attached, to be held by the sheriff in the same plight and for the same purpose as the property would be if still held in his possession; and upon the failure of the plaintiff in the present suit to establish his right, a judgment for the defendant to the full value of the property is a proper one, not as damages personal to himself, but to be held subject to the process of attachment.

APPEAL by plaintiff from *Brock, J.,* at the Spring Term, 1922, of SWAIN.

Civil action, brought by the plaintiffs against W. M. DeHart, sheriff of Swain County, to recover damages for the unlawful attachment of certain property claimed by them. One W. R. Coley, prior to this time, had been operating a "carnival show" in some of the western counties of this State. On 9 March the plaintiffs allege that they purchased this show, paid the cash for the same, took a bill of sale therefor, and were the owners thereof. The bill of sale was recorded in Cherokee and Swain counties. Some time after this, on 5 April, one Ernest Bowman brought an action against Coley in Cherokee County, and on 23 April a warrant of attachment was issued by the clerk of Cherokee County to the sheriff of Swain County, and the sheriff of Swain County, under said warrant, attached the property of the show. The warrant of attachment did not bear the seal of the court of Cherokee County.

Plaintiffs allege that when the sheriff of Swain County attached said property they notified him that the property did not belong to Coley, and took him to the register of deeds' office and showed him a bill of sale for the same, which had been given to plaintiffs, and which had been on the record for some time. That the sheriff, nevertheless, levied the attachment without regard to plaintiffs' rights, and this action is brought by the plaintiffs against the sheriff because of the unlawful levy and conversion. But one witness was examined, to wit: plaintiff John A. Tatham. He testified that he and his associates had purchased the "carnival show" outright, and paid for the same; that the purchase was in good faith. The plaintiffs introduced in evidence the court papers in the case of Bowman against Coley, from Cherokee, for the purpose of showing that the warrant of attachment did not bear the seal of the court, and also introduced a portion of the defendant's answer, in which he admitted that he made the levy under the warrant from Cherokee County.

The following four issues were submitted to the jury, and they were directed by the court to answer each of the first two issues, "No," the third issue "Nothing," and, if they believed the evidence, to answer the fourth issue "$3,000":

"1. Are the plaintiffs the owners and entitled to the possession of the property described in the complaint?

"2. Did the defendant wrongfully take possession of said property under color of his office, as alleged in the complaint?

"3. What damage, if any, are plaintiffs entitled to recover of said defendant?

"4. What was the value of the property seized in the claim and delivery proceedings in this cause from the sheriff of Swain County?"

The issues were answered accordingly.

Judgment was entered upon the verdict in favor of the defendant, and the plaintiff, having reserved exceptions, appealed.

G. L. Jones, M. W. Bell, and Bourne, Parker & Jones for plaintiff.
J. H. Dillard, McKinley Edwards, and S. W. Black for defendant.

WALKER, J. It is stated by the plaintiffs in their brief, and was repeated in the argument before us, that the court directed a verdict on the first three issues, and required the jury to assess the damages against the plaintiffs under the fourth issue, because the plaintiffs had misconceived their remedy. That they could not proceed by an independent action against the defendant as for a conversion of the property, but that their only remedy was by intervention in the original action in which the warrant of attachment had issued. If this was the ground of the decision, there was error, as in such a case the party whose property is wrongfully attached may recover his damages for the seizure and conversion by a separate action against the wrongdoer. 35 Cyc., pp. 1818 and 1830; Cooley on Torts (3 ed., 1906, by Lewis), pp. 778 *et seq.; Gay v. Mitchell,* 146 N. C., 509; *Martin v. Buffalo,* 128 N. C., 305; Murfree on Sheriffs (Ed. of 1884), sec. 925. *Judge Cooley,* in his treatise on Torts, at p. 778, says that "wrongs by a sheriff to others than the parties to suits are generally a consequence of his mistakes or his carelessness. Thus, he may on an execution against one person, by mistake, seize the goods of another. He must, at his peril, make no mistake here." In this case, for example, the process of attachment authorized him to levy upon and seize only the goods or property of the defendant in the attachment suit, and not that of a stranger to the same, and when he levies and takes into his possession property not subject to seizure under the process, as in this case, when it belongs not to the defendant but to another, he subjects himself to an action for the wrong. He must be careful to see that he acts under the process and within the authority it confers. Cooley, *supra. Gay v. Mitchell, supra,* is an apt illustration of the principle. The sheriff held an attachment against a defendant therein, and levied it on property not belonging to that defendant, but to the plaintiff, and took possession of it. An action was brought by the owner of the property against him to recover damages for the conversion, and for injury to the property, which was machinery, by the freezing and rusting of the pipes and tubes and other parts, which could have been prevented by the exercise of ordinary care. This Court held that "on the testimony, if believed, an actionable wrong was undoubtedly established, and, under the charge of the court, the jury properly awarded the actual damages, which were the natural, probable, and direct result of defendant's wrong," and further said, "We do not well see how any other verdict could have been rendered." That case is much like ours, for there the attachment was issued and the levy and seizure was made under and by virtue of it, and there was no suggestion or intimation by the court, and no contention by the defendant, that the plaintiff should have proceeded by intervention in the attachment suit, and could not sue independently of it. We are not deciding whether the plaitiff could have resorted to an intervention, or interpleader, but whether he is compelled to do so, or can sue the sheriff directly for the wrong, as he would any other tort feasor.

The plaintiffs contend that there is the following objection to the judgment, which we state in their own language: "The court erred in rendering the judgment that it did. The judgment provided that the defendant DeHart have and recover of the plaintiffs the sum of $3,000. At the most, the defendant DeHart would be entitled to recover only such amount not exceeding $3,000, as the plaintiff Bowman might recover of the defendant Coley in the Cherokee County action. Under the judgment as it stands, DeHart can issue execution and recover the full amount of the judgment without regard to the result of the other action, and without regard to the fact that he is holding this property only as sheriff, and as the legal custodian in the attachment proceeding, instituted by Bowman against Coley."

The answer to this objection is that as the defendant recovered judgment for the value of property held by him under the attachment, the money, which represents that property, would be held by him instead of it, and in the same plight and for the same purpose as the property would be if he still held possession of it. He certainly would not recover the damages for the purpose of appropriating them to his own personal use, but subject to the process of attachment which was issued to him from the court.

But when the case is again tried upon the evidence and the proper instructions, the question last considered, and all others which may be raised by the parties, will be determined and the appropriate judgment entered in the case. It is not necessary, if it would be proper, for us to now discuss them, as we cannot well anticipate in what precise form they will be presented. The case has not been tried by the jury upon the evidence, as the verdict was a directed one.

There was error in the charge of the learned judge, which requires that another trial be had.

New trial.

DILL-CRAMER-TRUITT CORPORATION AND M. L. PARKER v. JACKSONVILLE LUMBER COMPANY, CHARLES M. WARNER, AND C. C. CODDINGTON.

(Filed 2 June, 1922.)

1. **Deeds and Conveyances—General Description—Boundaries—Plantation—Intent.**

Where the title to lands in dispute is dependent upon the description thereof in a deed given by the sheriff to the defendant under execution sale, wherein he described the lands as a certain plantation, which is shown to have been well known, with established boundaries, with an attempted but erroneous specific description in part as to adjoining boundaries, the intent of the grantor to convey the plantation by its established boundaries as gathered from the whole instrument will prevail over the inaccurate or attempted more definite description, which construed alone would be insufficient to convey any lands within the contemplation of the parties.

2. Same—Reference—Appeal and Error.

Where the action involving title to lands depends upon the intent of a grantor in a deed as to the identity of the lands described, and by consent of the parties has been referred and upon sufficient supporting evidence, the referee has found the intent to have been to convey a certain and known plantation with definite boundaries, and such finding has been adopted by the trial judge, the fact so established will not be disturbed on appeal.

3. Same—Decisions—Opinions.

The rule that the courts will adopt a more particular or specific description in a deed to lands, as being more certain and reliable than a more general one, has no application when it is shown that the more particular description is so manifestly erroneous, and is so in conflict with the more general one, and so indefinite and inadequate that it will not fit the description of the land clearly intended to be conveyed, and the general description is alone sufficient and definite for the purpose.

4. Same—Execution—Sheriff's Deed.

A sheriff's deed to land sold under execution of a judgment described the lands as Town Point Plantation, and gave particular boundaries that were incomplete and inaccurate: *Held*, it was competent to show that the plantation was well known in the community under definite bounds as designated, that the execution had been issued and the sale advertised and made of this particular tract of land, and these facts being established, the attempted and ineffectual part description by certain boundaries should be disregarded in ascertaining the land actually conveyed by the sheriff's deed.

5. Appeal and Error—Reference—Consent Reference—Findings—Issues —Trial by Jury—Waiver.

Where, under a consent reference, the parties waived their right to a trial by jury of the facts at issue, and one of them claimed title to the *locus in quo* by adverse possession, a finding by the referee, as a fact, upon supporting evidence confirmed by the court, that there has not been such possession, eliminates this question on appeal.

APPEAL by plaintiff from *Devin, J.*, at the October Term, 1921, of ONSLOW.

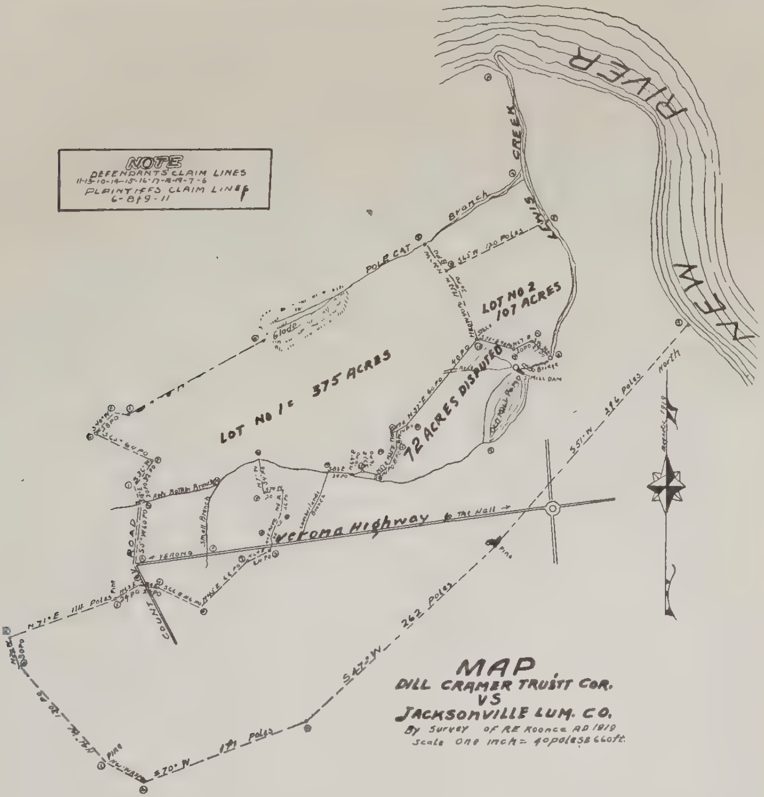
This action was brought to recover a tract of land containing seventy-two acres, more or less, which is described in the amended complaint, and the timber thereon, the plaintiffs alleging that the plaintiff M. L. Parker is the owner of the said land, and the Dill-Cramer-Truitt Corporation is the owner of the timber on the same.

The defendants answered and denied the ownership by plaintiffs, as alleged, of the land or the timber thereon. It appears that the admitted source of title on both sides was William S. Hill, who formerly owned the disputed land, and who conveyed it, by good and sufficient deed, dated 30 November, 1827, and duly registered, to Edward Ward, who died, leaving a last will and testament, dated 12 August, 1834, in and by which he devised the said tract of land to his sister, Fanny Mumford, for and during her life, and at her death to his nephew, Edward M. Mumford. That Fanny Mumford died, and Edward M. Mumford then became seized and possessed in fee simple of the said tract of land. The defendants allege, in this connection, and in answer to the plaintiffs' allegations in this respect, that while Edward M. Mumford was thus the owner of the tract of land, a judgment was duly rendered against him in the Superior Court of Onslow County, and an execution was duly and regularly issued against him, to the sheriff of said county, one E. Murrill, who duly and regularly levied the same upon the lands devised by Edward Ward to Edward M. Mumford, and after due advertisement the said sheriff sold said land as provided by law on 1 May, 1869, conveyed the same, as sheriff, by deed to L. W. Humphrey and E. S. Parker, as appears by the registry of the said deed, "and that the said Humphrey and Parker did at once take possession of the same thereunder, and did exercise and use said possession under and by virtue of the said deed up to all the boundaries thereof as set out in the aforesaid deed from Hill to Ward, and that thereafter E. S. Parker and wife conveyed to L. W. Humphrey all their right, title, and interest in the above described Hill-Ward lands, and that L. W. Humphrey did thereafter, to wit, on 17 March, 1870, convey all of the land (which is described in the deed from William S. Hill to Edward Ward) to one R. W. Ward, and by *mesne* conveyances these defendants are now the owners of all the interest of the aforesaid parties in and to the above described lands, as well as the other lands described in deeds from other parties, all of which together comprise the lands known as the 'Town Point Plantation,' and conveyed by the defendant Charles M. Warner to the defendant C. C. Coddington, and the defendants, according to their respective rights among themselves, are the absolute owners in fee simple thereof."

Plaintiffs allege that while Edward M. Mumford was the owner of the land devised to them, he conveyed twenty (20) acres of the land to Reuben Everitt by the following description: "The certain tract or parcel of land lying and being in the county of Onslow, bounded on the west side by Lewis Creek, and entirely surrounded on all other sides by the lands of the said party of the second part, known as the Everett land, the aforesaid parcel of land being near the Montfort mill seat, containing 20 acres, more or less." That by mistake of the draftsman the word "west" was inserted for "east," and that the description of the 20 acres should read as follows: "The certain tract or parcel of land lying and being in the county of Onslow, bounded on the *east* side by Lewis Creek, and entirely surrounded on all other sides by the lands of the said party of the second part, known as the Everett land, the aforesaid parcel of land being near the Montfort mill seat, containing 20 acres, more or less."

The description in the sheriff's deed to Humphrey and Parker is as follows: "Bounded on the north by New River, on the west by Lewis Creek, then following calls for certain adjoining lands, containing 1,300 acres, more or less, and known as 'Town Point Plantation.'"

The case was referred to Hon. E. K. Bryan, and the referee made his report to the court, in which he stated separately his findings of fact and conclusions of law, and without now stating what they were, we may say generally that he concluded, and so reported, that the plaintiffs were not entitled to recover, but that defendants are the owners of the land in dispute between them. The judge, upon exceptions by plaintiffs, approved and confirmed the referee's findings of fact and conclusions of law.



Among other things, the referee found:

1. That the description contained in the deed from Reuben Everett to John Shepard, heretofore referred to, did not convey to John Shepard the 72 acres in dispute in this action, and that the parties intended the lines of "Town Point Plantation," as shown on the map hereto attached,

from 11 to 13, to 10, to 14, to 15, to 16, to 17, to 18, to 19, to 7, thence to 6, as the bounds of the deed from Reuben Everett to John Shepard, which said line is the line of the "Town Point Plantation" referred to in said deed; and, therefore, the deed from Reuben Everett to John Shepard did not convey to John Shepard the 72 acres in dispute in this action. That the plaintiffs assert title to the land and timber respectively claimed by them, through *mesne* conveyance and inheritance from the said John Shepard. One of the boundaries of said land, pertaining to this case, being "on the east and south by Lewis Creek and the land known as the 'Town Point Plantation,' formerly the property of E. W. Mumford."

2. That "Town Point Plantation," at the date of the judgments, levy, advertisement, and sale by the said Elijah Murrill, sheriff, and at the time he executed and delivered the deed to Humphrey and Parker, was a well known tract of land, and consisted of the lands within the bounds described in the deed from William S. Hill to Edward Ward offered in evidence, and that the lines, as called for in that deed, were the lines and boundaries of "Town Point Plantation," and were known as such, and that said description is a specific description by metes and bounds and courses and distances, and that "Town Point Plantation" included within its bounds the lands in dispute in this action. And again, the referee found that the said sheriff levied said execution upon "Town Point Plantation," and one house and lot in Jacksonville, N. C., and under due process advertised and sold "Town Point Plantation." The judgment roll and entries were made part of the findings, the same as if fully set forth therein.

3. That the deed from Elijah Murrill, sheriff, to Humphrey and Parker was made by the sheriff in pursuance to judgments lawfully and legally obtained by the plaintiffs against the defendants mentioned therein, and that executions were duly issued to the sheriff upon said judgments, and in accordance with law and the command contained in said executions and the *venditioni exponas*, the sheriff levied upon, advertised, and sold the lands comprising "Town Point Plantation," and made the deed heretofore mentioned. He also found from the evidence, which reveals just what lands constitute "Town Point Plantation," it was the intent and purpose of said sheriff in making said deed to the purchaser, and in making his levy and sale to sell and convey to the purchasers all of the lands constituting "Town Point Plantation," and that if, as a matter of law, the call for Lewis Creek as the western boundary in said deed does not of necessity make the creek entirely the western and northwestern boundary of the land conveyed, then "Town Point Plantation" is, and was intended as, the controlling description, and is quite definite, and said deed conveyed to the said Humphrey and

Parker all of "Town Point Plantation," and conveyed to said purchasers the legal title to the land in dispute by the courses mentioned in the Hill deed to Ward from .... to 12, to 11, to 13, to 10, to 14, to 15, to 16, to 17, to 18, to 19, to 7, to 6 on the map.

4. Besides being found as a fact by the referee, it was admitted by plaintiffs, as reported by him, that "Town Point Plantation" included the disputed land or *locus in quo.*

There are many other findings of the referee, and conclusions stated by him, which need not be stated.

The court having confirmed the report, entered judgment for defendants, and plaintiffs excepted thereto and appealed.

Duffy & Day and Rountree & Davis for plaintiffs.
I. M. Bailey and McLean, Varser, McLean & Stacy for defendants.

WALKER, J. This case is not like many of its kind to be found in the books, where the trials were by jury. The cause was referred, by consent of the parties, to a referee, who definitely found the facts and stated his conclusions of law therefrom, his decision being for the defendants, which was adopted and confirmed by the judge upon exceptions thereto, and judgment given for the defendants.

If we are to be governed at all in our decision of this case by the referee's findings of fact, which are binding upon us, there being evidence, as there is here, to support them (*Bailey v. Hopkins,* 152 N. C., 748), it is manifest that the sheriff's deed was intended to convey to the purchaser at the execution sale all of the "Town Point Plantation," it having distinct and clearly defined boundaries, and being a tract of land which was well known to the people who lived in the section where it was situated, and it is further evident that the other calls in the deed for adjoiners, if so it may be termed, was an erroneous one, and that the deed will not have any effect, unless the description of the land conveyed as the "Town Point Plantation" is permitted to prevail over the other and mistaken one. A similar question was presented and considered in *Quelch v. Futch,* 172 N. C., 316, where, at p. 317, the Court said: "We have in the deed in question a description by metes and bounds in which the land in controversy is not conveyed, and also a description which refers to another deed duly recorded by book and page, which gives a definite description covering the land in controversy. It must be admitted that if the first or specific description entirely is eliminated from the deed, according to the evidence, the second or general description is sufficient, and covers the land described in the complaint. It matters not that the last description follows the warranty. The whole deed must be so construed as to give effect to the plain intent of the grantor, and the parts of the deed will be transposed if necessary. *Triplett v. Williams,* 149 N. C., 394; 13 Cyc., 627. The entire description in a deed should be considered in determining the identity of the land conveyed. Clauses inserted in a deed should be regarded as inserted for a purpose, and should be given a meaning that would aid the description. Every part of a deed ought, if possible, to take effect, and every word to operate. A reference to another deed may control a particular description, for the deed referred to for purposes of description becomes a part of the deed that calls for it. 13 Cyc., 632; *Brown v. Rickard,* 107 N. C., 639; *Everett v. Thomas,* 23 N. C., 252. The manifest intention of the grantor, Cronly, was to convey the whole of a tract of land, containing 700 acres, more or less, being the land conveyed to Cronly by Kirkwood, and by Williams to Kirkwood. It is in evidence that these deeds referred to cover the land in controversy. The fact that the metes and bounds of the preceding description do not cover it cannot be permitted to destroy the description that does cover it. From the language of the deed an intent to convey the entire tract is plainly manifest, and this intent will not be defeated because the grantor inserted metes and bounds that are erroneous and do not cover it. As the general description is added, not simply to set out the grantor's title, but to identify and further describe the tract of land conveyed, such general description will be given effect. The additional clause will be considered as added for the purpose of giving a more particular description," citing *Rutherford v. Lacy,* 48 Mo., 325; *Jackson v. Barringer,* 15 Johns (N. Y.), 471; *Lodge v. Lee,* 6 Cranch (U. S.), 237; 13 Cyc., p. 634, note 14. It is then pertinently added by the Court: "In the deed we have under consideration the second or general description is introduced, not solely to set out a chain of title, but evidently to identify, make certain, and describe the land conveyed. It is, in fact, an 'independent description of the land so conveyed,' and amply sufficient to support the deed, eliminating any other description."

And so we may say, with reference to the deed now in question, the second description was intended, and is, an independent one, which was intended not merely to show the chain of title, but to identify and more certainly to describe the land conveyed. In this connection we may well refer to 5 Cyc., p. 881, where it is said: "When there are two descriptions in a deed, one of which describes the premises conveyed generally by number or name, and the other gives a particular description by metes and bounds, or courses and distances, which is erroneous, the latter will be rejected." The following cases are cited in the notes to support the text, and they appear clearly to do so: *Haley v. Amestory,* 44 Cal., 132; *Case v. Dexter,* 106 N. Y., 548, at 554; and we add *Slater v. Rawson,* 42 Mass. (1 Metcalf), 450, and *Rutherford v. Lacy,* 48 Mo.,

325. In the first of these cases, it is said: "But, however this may be, we are of the opinion that the ranch is well described by name, and that the particular description was not intended to be used in the sense of restriction. The language is: 'All the undivided two-thirds (⅔) of all the lands known by the name of Rancho de San Vicente, situate in the county of Los Angeles, and State of California, the lands of said ranch being known and described as follows.' This language indicates that the dominant idea in the mind of the grantor, when the deed was made, was of the Rancho of San Vicente as a whole, and not of the particular lines or marks by which it might be described." This being so, the deed must be held to convey two-thirds of the whole ranch, however erroneous may be the particular description, citing *Peck v. Mallams,* 10 N. Y., 532; *Stanley v. Green,* 12 Cal., 148. And in *Case v. Dexter, supra,* the Court, in discussing the same question, remarked: "This is not the case of cutting down an interest or estate, once clearly given, by subsequent indefinite or ambiguous language. All the language in the deed, to which we have referred, is a part of a single description, and the sole question is, What land is embraced therein?" In *Rutherford v. Lacy, supra,* the Court, after considering the question, illustrates it in this way: "If A. sells to B. his farm, and then goes on to describe the farm by course and distance, and there is a mistake or erroneous description, the whole farm will, nevertheless, pass; because, in the case supposed, it was the manifest intention, gathered from the deed itself, to convey the whole farm. Had the grantor (the plaintiff in this case), in his deed, used any apt or appropriate words showing that it was not his intention to convey the whole lot, we should give them effect without regard to any mere verbal arrangement or position they might occupy in the deed. But as it is, without overthrowing well established principles of law, we are not at liberty to construe the deed otherwise than as passing title to the whole lot." See, also, 5 Cyc., p. 880 (II); 13 *ibid.,* p. 634, and note 14; *Masten v. Olcott,* 101 N. Y., at p. 158. It was upon the principle of construction just stated, and some of the authorities cited, that the case of *Quelch v. Futch, supra,* was decided. That case was again before this Court, and is reported in 175 N. C., at p. 694. It approved and affirmed the former case. *Chief Justice Ruffin* said, in *Proctor v. Pool,* 15 N. C., at margin p. 375: "Attempts have been made to discover artificial rules for discovering the intention, and the offices of terms of general and particular description defined. The truth is, no positive rule can be laid down; for as each subject differs in some respects from another, and each writer will be more or less precise or perspicuous in expressing himself, the whole instrument is to be looked at, and the inquiry then made, Can it be found out, from this, what the party means? . . . But there seems to be no danger of mistaking the

intention of the parties, when a thing is given by a particular name, by which it is well known, or by any other description which completely identifies it, although another particular be added which does not apply, it is true, to the thing as before described, but is equally inapplicable to anything else. In such case the effect of the true description ought not to be weakened by a further and unnecessary description which is false. . . . Or, as mentioned in *Reddick v. Leggat,* 7 N. C., 543, if one grant White-acre (by name), which descended from his father, White-acre shall pass, though it descended from the mother; because it was sufficiently identified before." The general rule is, to be sure, that a particular description will control a general one, because the law prefers the best evidence as to the intention of the parties, and when properly considered, the particular description is more certain and reliable than the other one, and this rule may be preserved in its integrity without conflicting with the principle we apply here.

By the modern and prevailing doctrine, we are required to examine the entire instrument and ascertain the true intention of the parties, for that is what the law seeks to effectuate. *Kea v. Robeson,* 40 N. C., 373; *Gudger v. White,* 141 N. C., 507; *Triplett v. Williams,* 149 N. C., 394; *Rowland v. Rowland,* 93 N. C., 214; *Beacom v. Amos,* 161 N. C., 357.

There is, therefore, another view as to the proper construction of the sheriff's deed, which is conclusively shown by his official acts after he received the execution against Edward M. Mumford. The referee finds with great precision that the sheriff levied the execution upon the "Town Point Plantation," which was then owned by the defendant in the execution; and further, that he advertised and sold the same. Mr. Freeman, in his valuable treatise on Executions, says that any descriptive words which would be sufficient in a voluntary conveyance are equally adequate in a conveyance made by the sheriff or other officer. Furthermore, descriptive words which are inadequate in voluntary conveyances are not necessarily so in a sheriff's deed, because they may be made certain by its recitals and other writings which are thereby so referred to that they may be properly considered as a part of the deed for the purpose of making its descriptive language more perfect. Thus, such a conveyance is ordinarily preceded by a levy and advertisement of sale, and often by a certificate of purchase, some or all of which are referred to in the deed. Hence, in addition to the words used for the purpose of description, it usually appears from the recitals that the land intended to be conveyed is that levied upon under a writ designated, and is that land which, at a time named, was advertised for sale, and afterward sold, and, though the descriptive words in the deed may be inadequate, or, in some respects, erroneous, such inadequacy may be made adequate or such error corrected by reference to the officer's return of his levy, or his notice of sale, or to that part of his return stating the property sold, and the person by whom it was purchased. In either event, we think the description must be regarded as sufficient to divest the title of the judgment debtor if all doubt is removed by incorporating in it the information derived from these various writings, all of which merely constitute successive steps in a proceeding of which the deed is but the last. 1 Freeman on Executions (3 ed.), pp. 1914 and 1915. And he further says: "It is by no means essential that, from a mere inspection of the description, the court should be enabled to know what lands are intended. The tract may be designated by some name not understood by the court, but perfectly familiar to all persons acquainted with the neighborhood in which the land is situated. Evidence may always be received to show the signification of such a name, or to show that any other descriptive words, though apparently meaningless or uncertain, do in fact designate a particular tract in such a manner that its identity would be apparent to all persons to whom it is familiar."

In this case it is expressly found as facts that the sheriff levied the execution upon the "Town Point Plantation"; that he advertised it for sale, and sold it, by that name, it being a well known tract of land in the particular section where it is situated. If not knowing its precise boundaries, he attempted to describe them and failed to do so, the description by its name will be sufficient, otherwise the deed would be ineffectual to convey the land "levied upon, advertised, and sold by the sheriff," as found by the referee *(falsa demonstratio non nocet)*. "Addition of false or mistaken descriptions in a deed will not frustrate the grant if there are others sufficiently clear to identify the thing intended to be granted." *Doe v. Jackson*, 1 S. & M., 494. See, also, *Sherwood v. Whiting*, 54 Conn., 330, where the subject is fully discussed with a copious reference to the pertinent authorities. And in *Slater v. Breese*, 36 Mich., 71, at p. 80, it is said by the Court: "It is not essential to the validity of a grant that the property should be so described as to avoid the necessity of an appeal to extrinsic proofs to apply the grant to the property. The subject-matter must undoubtedly be so ear-marked in the grant as to be capable of being distinguished from other things of the same kind. But it is always competent to fix and identify by extrinsic proof the natural monuments and other badges of identity and connect the description in the deed with the material subject-matter dealt with by it. The property to be granted may have a particular name by reputation, and if so, it may be described by such name, without giving monuments, boundaries, or the like; and outside evidence may be resorted to, to apply the name to that which it signifies. Indeed, the instances are rare in which no help whatever is required. If the means are given in the grant, either by a name of notoriety or by specified monuments and other definite particulars, to identify the thing meant to be granted, with the aid of outside examination and proof to fix and determine the (identity of the) name with the thing, the description is *prima facie* sufficient. And omitting to name the state, county, and township will not prejudice where other adequate elements of identification exist.

"It is also well settled that if there are descriptive signs satisfactorily ascertained which designate the thing meant to be granted, the addition of circumstances or accompaniments which are untrue will not defeat the grant. They may be rejected. This principle is confirmed and its application illustrated in numerous cases. Now, it is quite plain that the descriptive part of complainant's mortgage has some inaccuracies, but it is equally plain that the terms of the description, when taken together, are abundantly sufficient, with such aids as are admissible, to identify the land." This case refers to many authorities in support of the principle.

It was said by *Justice Ashe,* in *Credle v. Hays,* 88 N. C., at p. 324: "In our case the intent of the parties to the deed from the sheriff to Tilson Credle to convey the land owned by B. F. Credle (the defendant in the execution under which it was sold) manifestly appears from the deed itself; and if the calls of courses in the deed should be held to be the true boundary of the land conveyed, the intent of the parties would be entirely disappointed," because, as he adds, the deed, if read according to the calls, does not cover the land evidently intended to be conveyed, and therefore would be ineffectual, and that would be the result in this case, unless the other description, "Town Point Plantation," is taken to be the true and controlling description (*Quelch v. Futch, supra*), it having been found by the referee to be not only an accurate one, but also that the tract of land thus described is in itself well known to those living in the community or locality, where it is situated, and has well defined lines and boundaries. See *Lodge, Lessee, v. Lee, supra,* where only part of the island was described by definite calls, when *all* of it was intended to pass to the grantee. *Rutherford v. Lacy,* 48 Mo., 425; *Jackson v. Barringer,* 15 Johnson, 471; 13 Cyc., p. 634, note 14.

Before closing, we should call attention to the fact that in *Ferguson v. Fibre Co.,* 182 N. C., 731, we have recently considered the question as to specific and general descriptions in deeds, and other instruments, citing and commenting upon *Quelch v. Futch, supra,* though one of the descriptions in the *Ferguson case, supra,* was by metes and bounds and the other so to a certain extent. But the case has some bearing upon this one, and illustrates the principle that the law seeks for the intention of the parties, and will enforce it when it can be ascertained, and especially so when it is manifest.

The defendants contend that there are other difficulties for the plaintiffs to overcome before they can establish a title to the land or timber, but it is unnecessary to consider them, the decision of the question as to the sheriff's deed being sufficient to settle the controversy.

The reference having been by consent of the parties, the plaintiffs were not entitled to have issues submitted to the jury.

We have not discussed the question of adverse possession, as that was settled by the finding that there had been none, the title to the land having been continuously in dispute.

We find no error in the record, and therefore sustain the judgment.

Affirmed.

CAROLINA SALES COMPANY v. WHITE & WILDER.

(Filed 22 February, 1922.)

(For digest, see *Johnson v. Yates, ante*, 24.)

CLARK, C. J., dissenting.

APPEAL by plaintiff from *Devin, J.,* at June Term, 1921, of DURHAM.

In the above case, upon facts substantially similar to those presented in *Johnson v. Yates, supra,* there was judgment for defendants, who held the property for repairs done at the instance of the purchaser of the automobile in possession of and using same with assent of the mortgagee.

W. G. Bramham for plaintiff.
Bryant & Brogden for defendant.

PER CURIAM. For the reasons stated in *Johnson v. Yates, supra,* the judgment in the instant case is

Affirmed.

CLARK, C. J., dissenting: This case presents the same point as in *Johnson v. Yates, ante,* 24, which is whether the vendor, who has secured the balance due on the purchase money for an automobile by a mortgage duly registered in the proper county, loses his priority by the fact that a mechanic in another county has subsequently placed repairs on the machine without the knowledge or consent of the mortgagee. It is sufficient to refer to what has been said upon the same point in the dissenting opinion in *Johnson v. Yates, supra,* at p. 31. The mortgagor is simply a tenant at will to use the machine, and has no implied authority to "improve the owner out of his property."

The danger of improving the owner out of his property is emphasized by the fact that in this case there is a balance still due the vendor on his mortgage of $430 and the lien asserted for repairs is $177.

JOHN D. WESTBROOK, INC., v. J. B. McCRARY COMPANY, INC.

(Filed 15 March, 1922.)

Principal and Agent.

APPEAL by plaintiff from *Horton, J.,* at December Term, 1921, of CHOWAN.

W. D. Pruden for plaintiff.
Tooly & McMullan for defendant.

PER CURIAM. This action was brought to recover damages of the defendant because it had falsely represented itself to be the agent of the town of Belhaven for the purchase of certain material—jute and steel—which the town needed in the construction of a light, water, and sewerage system. At the conclusion of the evidence, and on defendant's motion, the court ordered the action to be dismissed as on a nonsuit, and plaintiff appealed. This was done, as we infer from a careful examination of the record, because it appeared that the defendant was acting rightfully as agent of the town at the time the goods were ordered, without regard to subsequent events, by which the town, by the action of the court, was deprived, at least temporarily, of the power to proceed in the matter, which power was eventually restored. The defendant was in no default in its dealings with the plaintiff, and not liable to it, as alleged, and the nonsuit was, therefore, properly ordered.

The plea of the statute of limitations may present more difficulty, but it is unnecessary to discuss it here.

No error.

B. E. HAGOOD v. J. C. HOLLAND ET AL.

(Filed 15 March, 1922.)

Contracts—Damages.

APPEAL by defendants from *Lyon, J.,* at October Term, 1921, of CRAVEN, in an action to recover damages for an alleged breach of contract. From a verdict and judgment in favor of plaintiff, the defendants appealed.

Moore & Dunn for plaintiff.
Ward & Ward for defendants.

PER CURIAM. Affirmed on authority of same case, reported in 181 N. C., 64, where the facts are fully set out. They need not be repeated here. The case seems to have been tried substantially in accordance with our former opinion.

No error.

C. L. ABERNETHY ET AL. v. JOHN H. GODETTE ET AL.

(Filed 15 March, 1922.)

Attorney and Client—Contracts—Fees—Evidence—Recovery—Questions for Jury—Trials.

Where there is evidence tending to show that after an attorney had been engaged professionally by his client, they entered into an agreement as to the amount of compensation to be paid, owing to the fiduciary relationship of the attorney, the parties are not on equal terms; and the reasonableness of the amount agreed upon may be inquired into by the jury, upon the evidence; and an instruction that the client will be bound by their agreement, excluding an inquiry into the reasonableness of the fee, is reversible error. *Stern v. Hyman*, 182 N. C., 422, and *Casket Co. v. Wheeler*, 182 N. C., 459, cited and applied.

APPEAL by defendants from *Lyon, J.*, at November Term, 1921, of CRAVEN, in an action to recover the face value of a promissory note. From a verdict and judgment in favor of plaintiffs, the defendants appealed, assigning errors.

Ward & Ward and Charles R. Thomas for plaintiffs.
E. M. Green and R. A. Nunn for defendants.

PER CURIAM. The note upon which this suit is brought, as alleged in the complaint, "was made, executed, and delivered by the defendants to the plaintiffs for balance due for professional services rendered, and to be rendered by the plaintiffs, as attorneys, to the defendant John H. Godette, at the special instance and request of both of the defendants, John H. Godette and J. W. Belangia."

Briefly, the circumstances under which said note was signed and delivered were as follows: In December, 1918, John H. Godette was a deserter from the United States Army, hiding out or concealing himself in the woods of Craven County. He sent his codefendant Belangia to New Bern to employ counsel to represent him and to assist in getting him out of his trouble. Belangia called upon the plaintiffs, and we now quote from the testimony of Mr. Abernethy:

"Mr. Belangia came to our office and said, 'I have a colored man that I am interested in, and I want you to see if you can get him out of trouble.' I asked him what kind of trouble he was in, and he told me he had left camp—deserted. I said, Mr. Belangia, it is a difficult thing to do, and I don't like to engage in that kind of business. It will cost you a good deal of money. In the first place, I have got to take your boy to camp, it is a long trip, I am just as busy here in the office as I can be at this time, and, more than that, it subjects a man, more or less, to criticism, but I am in the practice of law for legitimate business, and I will do it if you folks will pay the price. He asked me what it would cost him, and I said, it will cost you at least $3,000. He replied, 'That is too much.' About that time Mr. Willis came in the office and we talked it over, and we agreed on a price of $2,000. I said, the only way is to take this boy back to camp and lay our cards on the table. Mr. Belangia said that looked to him like the only thing to do. He said he would carry us down to where this fellow was. Late that afternoon he got one of these coffin Fords and a colored man and started Mr. Willis and me down to Harlowe. It was a dark, rainy day and night came on pretty soon. He took us to a colored man's house on the road near Harlowe, and, when we went in, there was John sitting in there, calm and serene. I had known John before. Mr. Belangia did most of the talking, and said to him: 'I have arranged with this man to get you out of this trouble, how much money have you got?' John then begun to pull bills out—they were pinned with safety pins all around in his clothes. He pulled out four or five hundred dollars, and said that was all he had. Mr. Belangia said to him, 'Well, I will lend you some,' and he went down in his jeans and turned it over to Mr. Willis and me. I never had so much money in my life. He then said, 'What are you going to do about this other thousand?' They had made up a thousand right there. I said, 'Have you any property?' He then said he would sign a note with John for the other thousand. I said, 'We will have to discount the note or get the money on it from the bank.' I then tore a leaf out of some kind of a book there and Mr. Willis had a fountain pen. I wrote the note, I think, and they signed it, and we left. I told John I thought it was best for him not to go to New Bern. I said, 'I think you had better join me tomorrow night and I will take you on to Charlotte.' . . . When we arrived at camp I was introduced to the Judge Advocate. Some of his people lived in New Bern, and we talked about that for a little while, then I said to him, 'Judge, I don't reckon you ought to charge this fellow with desertion; he just got ready to leave and left.' I told him I had the negro out there in the automobile. He said, 'I expect we can fix it up, but you will have to deliver your man.' I called John in and he said, 'Boss, I just went home because my folks were sick.' I said, 'Judge, Mr. Willis tried to get John exempted from the draft on the theory of age; he can send you the papers. I said, 'You know the negro's character.' He answered, 'Well, that is all right; you can go on back and I will look out for John.' I went on to Washington to attend to some business matter there, and when I got home John was there with an honorable discharge and $60 bonus, so Mr. Belangia said."

Cross-examination: "We went down to Dove's house that night, wherever it was, and met John, and collected $1,000 and got the note. The next time I saw him was when he met me on the train at Clark's and I carried him to Charlotte. . . . We were in Charlotte all day long. I stopped at the Selwyn Hotel, and I arranged with the cook there to feed John, and some time in the afternoon I carried John out to the camp. I left Charlotte some time that night, and the next time I saw John he was back home. The service that I rendered him was that I got him released of this charge and got an honorable discharge. The man gave me to understand that he would take care of him. I expected to see John in a few days. They said if they needed me they would let me know."

In regard to the reasonableness and amount of plaintiffs' charges, his Honor instructed the jury as follows:

"Now, something has been said about exorbitant charges. You have nothing to do with that. The people have a constitutional right to make contracts, and if they make a bad or unfortunate contract when there is no fraud or misrepresentation it is enforceable against them. You have nothing to do with the charge. That is a matter between the parties who enter into a contract."

To this instruction the defendants except and assign same as error. We think the instruction was erroneous under the doctrine announced in *Stern v. Hyman,* 182 N. C., 422. It will be observed that the note was given "for services rendered and to be rendered." There is evidence, other than that quoted above, tending to show that the relation of attorney and client existed at the time of and prior to the agreement which resulted in its execution. This is not admitted by the plaintiffs, but the circumstances are such as to require a submission of the question to the jury. Of course, the instruction was correct, if no fiduciary relation existed at the time. *Casket Co. v. Wheeler,* 182 N. C., 459; Elliott on Contracts, sec. 2866.

New trial.

R. C. POWELL v. CAMP MANUFACTURING COMPANY; C. B. PAGE v. CAMP MANUFACTURING COMPANY.

(Filed 22 March, 1922.)

APPEAL by defendant from *Devin, J.,* at August Term, 1921, of DUPLIN, in an action to recover damages for an alleged negligent burning of plaintiffs' timber.

From an adverse verdict and judgment, the defendant appealed, assigning errors.

George R. Ward and Ward & Ward for plaintiff.
Stevens, Beasley & Stevens for defendant.

PER CURIAM. This case was before us at the Fall Term, 1920, and is reported in 180 N. C., 330. The facts were set out fully by *Walker, J.,* in delivering the opinion on the former appeal, and need not be repeated here. From a perusal of the record it appears that the case has been tried in substantial conformity with the law, as heretofore declared, and the present judgment must be affirmed.

No. 223, *Powell v. Mfg. Co.,* being an action for damages arising out of the same fire and caused by the same engine, for like reason must be affirmed. See, also, *Williams v. Camp Mfg. Co.,* 177 N. C., 512.

In both cases we find

No error.

W. A. BURCH, ADMINISTRATOR, v. J. D. BUSH.

(Filed 29 March, 1922.)

APPEAL by defendant from *Bond, J.,* at November Term, 1921, of FRANKLIN, in an action to recover moneys alleged to be due the plaintiff, and withheld by the defendant, on a logging and lumbering contract.

Upon denial of liability and issues joined, the jury returned the following verdict:

"1. Was the administratrix of S. L. Burch really able and willing to finish cutting the timber according to contract? Answer: 'Yes.'

"2. Was the administratrix of S. L. Burch kept from cutting the timber according to contract by any act of the defendants Bush & Company? Answer: 'Yes.'

"3. What damage, if any, did defendants Bush & Company sustain by failure of administratrix of Burch to cut said timber according to contract? Answer: 'Nothing.'

"4. What sum was withheld by defendants Bush & Company under 10 per cent clause of contract? Answer: '$445.'

"5. In what sum, if anything, is estate of S. L. Burch indebted to defendants Bush & Company by reason of overpayments on measurements? Answer: 'Nothing.'"

From a judgment on the verdict in favor of plaintiff, the defendant appealed.

William H. and Thomas W. Ruffin for plaintiff.
Willis Smith for defendant.

PER CURIAM. Affirmed on authority of same case, *Burch v. Bush,* 181 N. C., 125.

No error.

J. W. BROOKS v. ORANGE RICE MILL COMPANY.

(Filed 12 April, 1922.)

APPEAL from *Connor, J.,* at December Term, 1921, of NEW HANOVER.

It appears that plaintiff, a citizen of this State, having a cause of action against the Orange Rice Mill Company, a foreign corporation, instituted this suit in the Superior Court of New Hanover County, and sought to establish jurisdiction by attaching the proceeds of a certain draft in the hands of the American Bank and Trust Company of Wilmington, N. C., it being alleged that said funds belonged to the defendant. Thereafter, on 29 March, 1920, the Orange National Bank of Texas was allowed to intervene and set up its claim of title to the proceeds of said draft.

In a former trial the cause was tried on an issue of ownership of the intervening bank, and at the close of the evidence the court charged the jury that if they believed the evidence they would answer the issue of ownership in favor of the intervener, and from judgment on the verdict plaintiff appealed.

On the hearing of said appeal this Court reversed the action of the trial court, holding that on the evidence introduced by the intervener there were facts requiring that the issue of ownership be submitted to the jury. This opinion having been certified down, the present trial was had, and the cause submitted to the jury, on an issue as to claim of ownership by intervener, and as to indebtedness of the nonresident defendant to plaintiff.

There was verdict against the intervener, and establishing an indebtedness of defendant to plaintiff of $525 and interest from 26 December, 1919. Judgment on the verdict, declaring said indebtedness and appropriating the funds attached to extent required to satisfy the judgment and costs. Intervener excepted and appealed.

Ruark & Campbell for plaintiff.
Rountree & Davis for intervener.

PER CURIAM. There is no reason shown for disturbing the results of this trial. It was earnestly urged for appellant that there was no evidence in denial of the intervener's claim of ownership, but this same position was taken on the former trial, and the Court then held that on the testimony of the intervener, there were facts in evidence challenging its claim, and requiring that the issue be submitted to the jury. See *Brooks v. Mill Co.,* 182 N. C., 258. On practically the same evidence, the court, in pursuance of said decision, submitted the cause to the jury, who have found, as stated, against the intervener's claim.

We find in the present trial

No error.

W. D. TEAL AND J. F. THOMAS v. J. S. LILES, RECEIVER OF THE POLKTON LUMBER COMPANY.

(Filed 26 April, 1922.)

Appeal and Error—Counterclaim—Demurrer—Fragmentary Appeals—Dismissal.

Where there is neither verdict nor judgment upon the plaintiffs' alleged cause of action, defendant's appeal from an order sustaining the plaintiffs' demurrer to a counterclaim set up in the answer, is fragmentary, and will be dismissed.

APPEAL by defendant from *Lane, J.,* at November Term, 1921, of ANSON.

This is an action to recover for 43,187 feet of lumber at $22 per 1,000 feet, delivered by plaintiffs to defendant, and accepted by them. To the complaint the defendants set up a counterclaim for breach of contract in failing to manufacture lumber of certain timber, and asking judgment for $13,938.66 damages. The court sustained the demurrer of plaintiffs to the counterclaim, and the defendant appealed.

A. A. Tarlton and Robinson, Caudle & Pruett for plaintiffs.
B. V. Henry and McLendon & Covington for defendant.

PER CURIAM. The court having sustained a demurrer to the counterclaim, the defendant appealed, and asks this Court to reverse the judgment sustaining the demurrer on the counterclaim, and that a jury trial may then be had on the counterclaim. There was no verdict or judgment upon the plaintiffs' cause of action, and no judgment as to the costs. This Court has uniformly adhered to its ruling that it will not entertain a fragmentary appeal.

The whole subject was recently fully discussed with the fullest citation of authorities, and upon the reason of the thing, at last term, in *Cement Co. v. Phillips,* 182 N. C., 439, citing very numerous authorities.

That decision was cited with approval at last term by *Adams, J.,* in *Farr v. Lumber Co.,* 182 N. C., 727; and also in *Leroy v. Saliba, ibid.,* 757.

The rules of practice are well settled, and well known to the profession, and are based upon the soundest reasons in the dispatch of the public business by the courts, and a slight attention to them would avoid such inadvertences as in this instance.

Appeal dismissed.

MINNIE WITTY v. THE NATIONAL COUNCIL OF THE JUNIOR ORDER, UNITED AMERICAN MECHANICS.

(Filed 3 May, 1922.)

Affirmed under the principle announced in *Evans v. Junior Order, ante,* 358.

APPEAL by defendant from *Long, J.,* at January Term, 1922, of GUILFORD.

Civil action. Judgment for plaintiff; appeal by defendant.

N. L. Eure and R. C. Strudwick for plaintiff.
Douglass & Douglass and Murray Allen for defendant.

PER CURIAM. Without waiving a trial by jury, the parties agreed on the facts. The defendant, a secret fraternal order, is the supreme governing body of the Junior Order, United American Mechanics, and maintains a Funeral Benefit Department. In May, 1913, E. M. Witty became a member of Pleasant Garden Council, and his name was enrolled in said Funeral Benefit Department; but on 17 February, 1915, his name was stricken from the roll of Pleasant Garden Council, and did not thereafter appear in the record of membership on file in the Funeral Benefit Department of the defendant. Said Witty was reinstated in Pleasant Garden Council on 10 March, 1917, and remained in good financial standing until his death, which occurred on 17 August, 1919. When he was reinstated his name was given the recording secretary, to be sent to the Funeral Benefit Department for enrollment, but it was not sent. The name of J. E. Newman twice appeared on the roll of the Pleasant Garden Council on file in defendant's Funeral Benefit Department, and monthly assessments of the local council were paid to this department up to the time of Witty's death on the double enrollment of Newman's name. This double enrollment was made pursuant to the application of the recording secretary of the local council. Only one J. E. Newman was a member. The plaintiff is the legal dependent of E. M. Witty, and her contention is that the assessments paid by him to the local council were remitted to the defendant and erroneously credited to the double enrollment of Newman. In response to the issue, the jury awarded $500 as the amount of the defendant's indebtedness to the plaintiff.

There are fifteen exceptions in the record, all of which in the last analysis are directed to the legal proposition that the Pleasant Garden Council was the agent, not of the defendant, but of the plaintiff. In an opinion rendered at this term in *Evans v. Junior Order, ante,* 358, the question has been resolved against the defendant's contention. There it is said: "Since the Funeral Benefit Department is formed for the express purpose of paying funeral benefits to the members of the order, and as the defendant chooses to do the funeral benefit business through the local councils, it thereby makes the local or subordinate council its agent for the purpose." The judgment is, therefore,

Affirmed.

J. H. CLARK AND WIFE, M. J. CLARK, v. C. A. BROADWAY.

(Filed 2 June, 1922.)

APPEAL by defendant from *Daniels, J.,* at November Term, 1921, of LENOIR, in an action to determine the true location of the boundary line between the lands of plaintiffs and the defendant.

From a verdict and judgment in favor of plaintiffs, the defendant appealed.

Moore & Croom and Cowper, Whitaker & Allen for plaintiffs.
Rouse & Rouse for defendant.

PER CURIAM. This was a proceeding by adjacent landowners to settle a dispute as to the true location of the dividing line between their respective properties. The land claimed by the *feme* plaintiff is known as a part of the Council Hooten lands, and the land claimed by the defendant is known as the Jesse W. Broadway land. Both tracts are located in Contentnea Neck Township, Lenoir County.

J. W. Grainger purchased the Hooten lands in 1891 and conveyed same to *feme* plaintiff in 1900. The same J. W. Grainger purchased the Broadway land in 1890, and conveyed this land to defendant's predecessor in title in the year 1903.

Counsel on both sides have filed interesting and elaborate briefs; but, as we view the contentions of the parties, the case seems to have been tried in substantial conformity to the law appertaining to the facts, and we have found no ruling or action on the part of the learned judge which would warrant a reversal or an order for a new trial. The verdict and judgment will be upheld.

No error.

OLIVIA M. BLAKE ET AL. v. CHARLES O. CASE ET AL.

(Filed 2 June, 1922.)

APPEAL by defendants from *Brock, J.,* at October Term, 1921, of BUNCOMBE, in an action, under C. S., 1743, to quiet title, or to remove a cloud therefrom, and to have the plaintiffs declared to be the undisputed owners of the lands described in the complaint.

From a verdict and judgment in favor of plaintiffs, the defendants appealed, assigning errors.

Jones, Williams & Jones for plaintiffs.
Martin, Rollins & Wright for defendants.

PER CURIAM. The controversy on trial narrowed itself principally to questions relating to adverse possession under color of title. After a careful reading of the record, we are convinced that the case has been tried in substantial conformity with the law as bearing on the subject, and we have found no sufficient reason for disturbing the result below.

Upon the question of adverse possession, his Honor followed closely the decisions of this Court in the cases of *Alexander v. Cedar Works,* 177 N. C., 137, and *Locklear v. Savage,* 159 N. C., 236.

We have found no reversible or prejudicial error.

No error.

STATE v. GED BALDWIN.

(Filed 2 June, 1922.)

Intoxicating Liquor—Spirituous Liquor—Assisting in Manufacture—Instructions—Appeal and Error.

In an action for the unlawful manufacture of spirituous and intoxicating liquor, an instruction of the court, considered in its entirety and with reference to the evidence, that put the burden on the State to prove defendant's guilt beyond a reasonable doubt, and in effect to find him guilty if he took part in the manufacture, though he had not alone produced the completed product, is not reversible error.

APPEAL by defendant from *Brock, J.*, at November Term, 1921, of BUNCOMBE.

The defendant was prosecuted for the unlawful manufacture of spirituous and intoxicating liquor. The officers found a still site five or six hundred yards from the defendant's house—about 100 yards from his cornfield and 20 feet from his pasture, three or four barrels of beer, fermenters filled with beer, and a thumping keg used to put low wine in. They found tracks at the still and followed them through the cornfield into a branch from which there was a path leading to the defendant's house. The tracks corresponded with tracks made by defendant the day before his arrest. They were described as "peculiar," the sole having the appearance of cleats or "straps run not all the way across." The still and furnace had been pulled out; wood was found there, some of which had been taken from the furnace. The worm was not found, but the cap was, and the beer was about ready to be made into whiskey. The defendant introduced no evidence. His Honor charged the jury that the burden was on the State to satisfy them beyond a reasonable doubt that the defendant had engaged in the manufacture of liquor, that it was not incumbent on the prosecution to show that the defendant actually distilled the liquor within any specified time, but if the jury were satisfied from the evidence beyond a reasonable doubt that the defendant, within two years prior to the finding of the bill of indictment, "went there, either himself or with others, and made this beer, whether you find that he had actually distilled any of the beer or not," it would be their duty to return a verdict of guilty. The defendant was convicted, and from the judgment pronounced he appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Mark W. Brown for defendant.

PER CURIAM. The defendant's exception presents the question whether the instruction as to the manufacture of the beer constitutes reversible error. The charge must be considered in its entirety, and must be construed with reference to the evidence. *Hodges v. Wilson,* 165 N. C., 323; *Donnell v. Greensooro,* 164 N. C., 332. His Honor, after telling the jury that the defendant could not be convicted unless they should find from the evidence beyond a reasonable doubt that he had engaged in the manufacture of liquor, gave the further instruction that if they should find from the evidence beyond a reasonable doubt that the defendant, at any time within two years before the indictment was returned, had manufactured the beer, whether or not he had actually distilled it, they should return a verdict of guilty. Considered as an isolated proposition, the instruction would probably be subject to criticism, but when we consider the charge as a whole and in the light of the evidence we construe the instruction as meaning that if the jury should find from the evidence that the defendant made the beer they should then find that he was engaged in one of the processes of the unlawful manufacture of liquor, and if engaged in such process, he was engaged in such unlawful manufacture, and was guilty, as charged in the indictment. This interpretation brings the instruction within the principle discussed in *S. v. Blackwell,* 180 N. C., 733. While the defendant had not produced the completed product, he was engaged in the prohibited manufacture. The instruction should have been more definite, but we are not prepared to say that it constituted reversible error. The other exceptions are untenable, and require no discussion.

The judgment is
Affirmed.

STATE v. ROSCOE SIMMONS.

(Filed 22 February, 1922.)

1. **Intoxicating Liquor—Spirituous Liquor—Possession—Evidence—Presumption—Warrant—Search and Seizure.**

The defendant was seen entering with a suit-case into a house of another by the officers, and upon their following him, he endeavored unsuccessfully to escape by the back door, and when the suit-case was opened, it was found to contain eight quarts of liquor that smelled like brandy: *Held*, the seizure of the liquor under the circumstances did not require a search warrant.

2. **Same—Unlawful Transportation.**

Where the defendant has been arrested and eight quarts of spirituous liquor found in a suit-case he was carrying into the house of another, its possession is *prima facie* case of the unlawful purpose of sale, sufficient to convict him thereof; and, also, for unlawfully transporting the same. C. S., 3379.

3. **Intoxicating Liquor—Spirituous Liquor—Seizure—Unlawful Possession—Evidence.**

Where the *prima facie* case of unlawful sale of spirituous liquor arises from the possession, its capture by the officers is not illegal, and its being given to the jury for them to taste and smell, in corroboration of the other evidence, is not erroneous; and the liquor being the *corpus delicti*, such evidence would be competent had it been unlawfully seized, or in the illegal possession of the officers.

APPEAL by defendant from *Horton, J.*, at November Term, 1921, of PASQUOTANK.

The defendant was indicted in three counts:

1. Having in his possession a quantity of intoxicating liquors for the purpose of sale, to wit, nine quarts of grape brandy.

2. Transporting the same from one point within the State to another point in the State.

3. The receipt of the same in fifteen days.

General verdict of guilty. Judgment. Appeal by defendant.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Aydlett & Simpson and Thompson & Wilson for defendant.

CLARK, C. J. The evidence for the State was that the chief of police of Elizabeth City, accompanied by two officers, about 11 o'clock at night, went to the house where Bessie McGee lived. Soon after they arrived an automobile drove up and three persons got out, to wit, the defendant (Roscoe Simmons) and two others. Simmons was carrying in his hand a grip and went with it into the house. Sending one of his men to the back door of the house, the chief of police, with the other officer, immediately followed the parties into the house. The defendant seeing the officers entering at the front attempted to make his escape at the rear, though he testified that he went to the back porch to get some water. The grip that Simmons carried into the house, when examined by the officers, was found to contain eight quarts, which smelt like peach brandy, and they testified that in their opinion it was intoxicating liquor. The officers arrested Simmons and Bessie McGee, and took charge of the grip with the eight quarts of liquor, which was introduced in the evidence by the State and under objection by the defendant, the jury was permitted to smell it and taste it, if they desired, to determine whether it was intoxicating or not. The officers at the time of the arrest had no warrant for the arrest of the parties, and though something was said in the evidence about a search warrant, it is admitted that it was not in legal form, and is not considered.

The defendant presents two points: (1) That the liquor having been obtained on an illegal search warrant was not admissible as evidence; (2) that the court committed error in permitting the jury to smell and taste the liquor.

The officers found the liquor in actual possession of the defendant, with grounds, in their judgment, to believe that it was an illegal article, and had a right to seize the same. *S. v. Campbell,* 182 N. C., 911. It was for the jury to decide whether it was intoxicating liquor, and it was permissible for them to use their sense of taste and smell in passing upon the question. They were not restricted to the testimony of the officers who acquired the information upon which they based their opinion by the same method.

If intoxicating, as the jury found upon the testimony of the officers, corroborated possibly by their own sense of taste and smell, the defendant was properly found guilty, for he was illegally transporting spirituous liquor, and also under C. S., 3379, he was *prima facie* guilty of having more than a gallon in his possession for the purpose of sale.

The defendant in his evidence contented himself with testifying that he had nothing to do with the suit-case, and knew nothing of its contents, and that Satterfield carried the suit-case into the house, but he did not testify that he was carrying this liquor for his own use. *S. v. Coleman,* 178 N. C., 757. If he had so testified, the jury were at liberty to draw a different inference from the defendant's possession of eight quarts. The defendant contends that the grip and the liquor were illegally captured, and therefore it was not admissible in the evidence against him.

The capture of eight quarts, which the jury found was in the possession of the defendant, raised *prima facie* the presumption that it was illegally in his possession and its capture was not illegal. *S. v. Campbell, supra.* To the same effect *Adams v. New York,* 192 U. S., 585; *S. v. Bradley,* 96 Maine, 12; *S. v. Krinski,* 78 Vermont, 162.

In *S. v. Bradley, supra,* it is held: "If, in the case of a seizure of intoxicating liquors without a warrant, a respondent is arrested at the time of the seizure and before the issuance of the warrant, even if such arrest is illegal, it in no way affects the validity of the complaint and warrant, and cannot be taken advantage of by a respondent charged with having intoxicating liquors in his possession for an unlawful purpose, either before or after conviction."

In *S. v. Krinski, supra,* it is said: "On a prosecution for keeping for sale intoxicating liquors without a license, it was proper to admit in evidence liquors which had been seized, irrespective of the legality of the warrant."

The defendant was not the owner of the house. No question arises as to the validity of a search warrant. The defendant was simply "caught in the act" with the goods upon him, and the officers under the authority of our statute took the prisoners and the illegal goods before a magistrate and proceeded regularly.

In *Adams v. New York,* 192 U. S., 595, the Court said: "It may be mentioned in this place that though papers and other subjects of evidence have been illegally taken from the possession of the party against whom they are offered, or otherwise illegally obtained, there is no valid objection to their admissibility if they are pertinent to the issue. The Court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question." This is quoted with approval in *S. v. Wallace,* 162 N. C., 622, and has been the consistent opinion of this Court in all similar cases. The defendant contends that *Adams v. New York* has been overruled in *Gouled v. U. S.,* 28 February, 1921, but we do not so understand it. We understand the distinction there to be that where the article itself is the *corpus delicti,* as illicit liquor, or a weapon illegally carried, and in similar cases, the article itself, however obtained, is admissible in evidence, but that the Court under the *Gouled case* will not permit a paper surreptitiously or illegally taken from the possession of a defendant to be used as evidence in a matter in which it is not the basis of the offense for which the defendant is indicted.

Suppose instead of a grip the defendant and another had been seen to enter the house with pistols, and soon thereafter a shot was heard, and upon the officers entering the building one of the men was found lying dead on the floor and the other was caught attempting to escape from the rear. Is it possible that the finding of the pistol and of the dead man could not be put in evidence because there was no search warrant?

This would be carrying the protection of the illegal and clandestine violation of law, by a technicality, to an extent probably heretofore unheard of in a court of justice.

In this case the defendant entered the house carrying a grip full of intoxicating liquor and was captured at the back door. What has a search warrant to do with this state of facts? The defendant was caught "in the act," and has made no explanation, satisfactory to the jury, to account for his connection with the transportation of the liquor in the grip which he carried into the house.

No error.

STATE v. JOSEPH ADDOR AND J. A. YOW.

(Filed 22 February, 1922.)

1. Criminal Law—Attempt—Statutes.

An attempt to commit a crime is an indictable offense, and on proper evidence, a conviction may be sustained on a bill of indictment making a specific and sufficient charge thereof, or one which charges a complete offense. C. S., 4640.

2. Same—Preparation—Intent—Overt Acts.

The intent, though connected with preparations to commit a criminal offense, is not alone sufficient for a conviction of the attempt, unless connected with some overt act or acts towards the end in view that will, in the judgment of the one charged, and as matters appeared to him, result in the consummation of the contemplated purpose. C. S., 4640.

3. Same—Spirituous Liquor—Intoxicating Liquor—Verdict—Judgment.

Upon the trial for an attempt to violate our statute in the manufacture of intoxicating liquor, it was established by a special verdict that the defendants placed a bag of meal and nailed a coffee mill to a tree at the place of intended operation, with intent to manufacture the liquor, but that they had no still, but had a promise of one later: *Held*, insufficient to sustain a judgment of guilty of an attempt to commit the offense charged. C. S., 4640.

CLARK, C. J., dissenting.

CRIMINAL ACTION, determined on special verdict before *Ferguson, J.*, and a jury, at Fall Term, 1921, of MOORE.

The bill of indictment charged defendants in three counts:

1. With unlawful manufacturing of spirituous liquors.
2. Unlawfully aiding in such manufacturing.
3. In an unlawful attempt to manufacture, and setting forth the overt act, etc. Upon the evidence the jury rendered the following special verdict:

"In the above-entitled cause the jury rendered the following special verdict, to wit: That defendants, in June, 1921, placed a bag of meal in a swamp of Drowning Creek, Moore County, and at the same time and place nailed a coffee mill to a tree; that on 6 June, 1921, defendants placed two empty barrels in the swamp near said mill; that on 7 June, 1921, the defendants were arrested on a public highway near said swamp by a deputy sheriff, and the defendants had some meal and bran; that, at the time of being arrested, defendants stated to the sheriff that they intended to make some liquor out of said meal and bran; that defendants did not have a still, but stated that some one had promised to let them have a still later; that defendants intended to make some liquor, if they could get a still, but they never got a still and never made any liquor."

The above constitutes all the defendants did.

If, upon the foregoing verdict, the Court is of the opinion that defendants are guilty, then the jury for their verdict say the defendants are guilty; but, if upon said special verdict the Court is of the opinion that the defendants are not guilty, then the jury for their verdict say that the defendants are not guilty.

And on said special verdict the Court, being of opinion that defendants were not guilty, the verdict is so entered, and State excepted and appealed, assigning for error that on the facts established in the special verdict, defendants were guilty of an unlawful attempt, etc.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

R. L. Burns for the defendants.

HOKE, J. An attempt to commit a crime is an indictable offense, and as a matter of form and on proper evidence, in this jurisdiction, a conviction may be sustained on a bill of indictment making the specific charge, or one which charges a completed offense. *S. v. Colvin*, 90 N. C., 718; C. S., 4640. In 3 A. & E., p. 250, an unlawful attempt to commit a crime is defined as an act done in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual commission and possessing, except for failure to consummate, all the elements of the substantive crime; and in 16 Corpus Juris, at p. 113, it is said that an unlawful attempt is compounded of two elements: First, the intent to commit it; and, second, a direct, ineffectual act done towards its commission.

Speaking to the subject in 1st McClain's Criminal Law, at p. 190, the author says: "In a recent case the Court endeavors to cover the whole ground by saying that, 'An act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation, and must not be merely preparatory.' In other words, while it need not be the last proximate act to the consummation of the offense attempted to be perpetrated, it must approach sufficiently near to it to stand either as the first or some subsequent step in the direct movement towards the commission of the offense after the preparations are made. As said in another case: 'It need not be the last proximate act to the consummation of the crime in contemplation, but is sufficient if it be an act apparently adapted to produce the result intended. It must be something more than mere preparation.' "

And to the same effect in 8th R. C. L., at p. 279, it is said: "In order to constitute an attempt, it is essential that the defendant, with the intent of committing the particular crime, should have done some overt act adapted to, approximating, and which in the ordinary and likely course of things would result in the commission thereof. Therefore, the act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation. It must not be merely preparatory. In other words, while it need not be the last proximate act to the consummation of the offense attempted to be perpetrated, it must approach sufficiently near to it to stand either as the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made."

In the note to *People v. Moran,* 123 N. Y., 254, reported in 20 A. S. R., at p. 732, the editor quotes the definition appearing in Steven's Digest of the Criminal Law, p. 33, as follows: "An attempt to commit a crime is an act done with intent to commit that crime, and forming a part of a series of acts which would constitute its actual commission, if it were not interrupted," and the authorities cited in these text-books of approved merit are in full support of the positions as stated by them. *S. v. John Hurley,* 79 Vt., 28; *Groves v. State of Georgia,* 116 Ga., 516; *State v. Doran,* 99 Me., 329; *People v. Murray,* 14 Calif., 159; *Hicks v. Commonwealth,* 86 Va., 223, and the cases in our own State are in full accord with these well considered decisions. *S. v. Hewett,* 158 N. C., 627; *S. v. Hefner,* 129 N. C., 548; *S. v. Colvin, supra.*

In *Hewett's case, Brown, J.,* delivering the opinion, quotes with approval the definitions appearing in 1 Bishop's Criminal Law, sec. 728, that "an attempt is an intent to do a particular criminal thing, combined with an act which falls short of the thing intended, and in Burwell's Law Dictionary and Bouvier's Law Dictionary, describing an attempt as "an endeavor to commit an offense, carried beyond mere preparation to commit it, but falling short of actual commission." In *State v. Doran,* 99 Me., 329, reported also in 105 A. S. R., 278, it was held that "to constitute an attempt to commit a crime there must be something more than mere intent or preparation. There must be some act moving directly towards the commission of the offense after the preparations are made."

And in *People v. Murray, supra, Chief Justice Field,* delivering the opinion, said: "Between preparation for the attempt and the attempt itself there is a wide difference. The preparations consist in devising or arranging the means or measures necessary for the commission of the offense. The attempt is the direct movement towards the commission after the preparations are made."

All of the authorities on this subject are to the effect that the overt act required as an essential feature of the crime must go beyond mere preparation and be at least apparently possible to the reasonable apprehension of the party charged. 12 Cyc., p. 180. True, the cases hold that an impossibility to presently commit the crime, unknown to the defendant, may not be allowed to affect the question of his guilt, but where it is clear that the perpetration of the crime is impossible and that is known to the party, there can be no indictable attempt. The position is very well stated in the citation to Cyc., as follows: "To constitute an indictable attempt to commit a crime, its consummation must be apparently possible, or in other words there must be an apparent ability to commit it. If the means employed are so clearly unsuitable that it is obvious that the crime cannot be committed, the attempt is not indictable. On the other hand, the apparent possibility is all that is required. If there is an apparent ability to commit the crime in the way attempted, the attempt is indictable, although, unknown to the party making the attempt, the crime cannot be committed because the means employed are in fact unsuitable."

Applying these principles to the facts as presented in the special verdict, it is clear in our opinion that the acts of the defendant as there established were only in preparation, and did not amount to overt acts in the attempted commission of the crime. Within the language and purport of the Virginia decision of *Hicks v. Commonwealth*, 86 Va., 223, the alleged attempt did not amount to a direct ineffectual act towards the present manufacture of spirituous liquors, to a "commencement of the consummation," but, as indicated in the opinion of *Chief Justice Fields* in the *California case*, the said acts consisted only in "devising or arranging the means or measures necessary to the commission of the offense." Moreover, it is established as a fact by the special verdict that defendants at the time had never made any liquor, did not have a still, and had not been able to procure one, thus showing that the perpetration of the alleged crime was at the time obviously impossible.

There is nothing in our disposition of the present appeal that is in any way inconsistent with the cases of *S. v. Blackwell,* 180 N. C., 733, and *S. v. Perry,* 179 N. C., 718. In those cases the question of the unlawful manufacture of liquor was left to the jury on the testimony, and defendants were convicted, the Court holding in both cases that the facts in evidence permitted the inference of guilt. But here the fact of any unlawful manufacture is negatived by the special verdict which finds as stated that no spirituous liquors had ever been made by defendant, and that while defendants intended to make the liquor if they could get a still, they did not have one and had not been able to get one. We concur in the ruling of the court below that no unlawful attempt to commit the crime has been established, and this will be certified that defendants be discharged.

Affirmed.

CLARK, C. J., dissenting: The defendants were indicted on three counts for (1) making or manufacturing intoxicating liquors, and (2) that they did aid and abet in the manufacture of certain spirituous, malt and intoxicating liquors, and (3) that they did attempt to make and manufacture certain spirituous, malt, and intoxicating liquors by having assembled for the purpose a quantity of malt, ship-stuff and other ingredients for the purpose. The jury found the following special verdict: The defendants on 6 June, 1921, placed a bag of meal in the swamp of Drowning Creek, Moore County, and at the same time and place nailed a coffee mill to a tree; that on 6 June, 1921, defendants placed two empty barrels in the swamp near said mill; that on 7 June, 1921, the defendants were arrested on a public highway near said swamp by a deputy sheriff; that the defendants had some meal and bran; that at the time of being arrested defendants stated to the sheriff that they intended to make some liquor out of said meal and bran; that defendants did not have a still, but stated that some one had promised to let them have a still later; that the defendants intended to make some liquor if they could get a still, but they never got a still and never made any liquor. Upon the foregoing special verdict the Court was of the opinion that the defendants were not guilty and so instructed the jury. From this judgment and verdict the State appealed.

C. S., 4640 is as follows: "Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged or of an attempt to commit a less degree of the same crime."

In *S. v. Brown,* 113 N. C., 645, the Court held that the joinder of an act for a lesser offense or an attempt to commit the same is now mere surplusage. The defendants admitted that they had assembled the material, to wit, the bag of meal and some bran, and the means to convert it into intoxicating liquor, to wit, by nailing a coffee mill to a tree in a secluded place, and that they had placed two empty barrels there, and they admitted that they had done this with the intention of making said liquor, and had procured the promise of another party to furnish the still. If the defendants had completed their purpose they would have been guilty of the offense of making intoxicating liquor. Their completion of this illegal act had been prevented solely by the fact that they were discovered and arrested in their purpose before the promised still had been placed in position. The sole question is whether this was an attempt. In *S. v. Hewett,* 158 N. C., 627, an attempt is defined as "that which, if not prevented, would have resulted in the full consummation of the act attempted." The evidence in this case shows a deliberate crime begun, but through the interference of the officer left unfinished. If the act had been consummated, then we would not have to consider whether there had been an attempt. In this case, in the language of Lady Macbeth, it is, "the attempt and not the deed." Macbeth, Act II, Sc. 2.

Of the definition of "attempt" there is none better, clearer, or more succinct than that set out in Webster's International Dictionary, which defines the meaning of the word to be in law, "Such an intentional preparatory act as will apparently result, if not extrinsically hindered, in a crime which it was designed to effect." This definition has not been bettered or made clearer, and is in substance the same as is set out in all the law books.

In 12 Cyc., 177, an attempt is thus defined, "An attempt to commit a crime is an act done with intent to commit it beyond mere preparation, but falling short of its actual commission." Among the cases cited as authority for that definition is *Graham v. People,* 181 Ill., 477; *S. c.,* 47 L. R. A., 731, where it is said: "All the authorities describe an attempt to commit the crime; performing some act towards commission of crime; and the failure to consummate its commission."

All these elements are present in this special verdict. The same definition is given with citations of many cases. 4 Cyc., 887, and notes. 16 Corpus Juris, 115 (note 36) quotes: "One who hands matches to another and offers to pay him a sum of money if he burn another's house is guilty of an attempt." *S. v. Bowers,* 35 S. C., 262; *S. c.,* 28 Am. St., 847; 15 L. R. A., 199, and *People v. Bush,* 4 Hill (New York), 133, held that "similar facts were sufficient without the element of compensation offered. So also preparing camphane and other combustibles and placing them in a room and soliciting another to use them, has been constituted an attempt." *McDermott v. People,* 5 Park Cr. (N. Y.), 102.

In our own State the decisions are to the same effect. In *S. v. Jordan,* 75 N. C., 28, where the indictment was for an attempt to commit burglary, the Court held, "Wherever there is a criminal intent to commit a felony—in this case burglary—and some 'act' is done amounting to an attempt to accomplish the purpose without doing it, the perpetrator is indictable as for a misdemeanor." Wharton Criminal Law, sec. 2696. *The King v. Higgins,* 2 East, 4, is a very full and satisfactory authority. This has been cited with approval in *S. v. Colvin,* 90 N. C., 719, and *S. v. Stephens,* 170 N. C., 746.

S. v. Hefner, 129 N. C., 549, in which it was held that on an indictment for an attempt to commit a crime some overt act must be alleged, has been overruled expressly in *S. v. Stephens,* 170 N. C., 748, which points out that the statute under which the former decision was rendered has been changed by what is now C. S., 4613.

In *People v. Moran,* 123 N. Y., 254; *S. c.,* 20 Am. St., 732, it was held that "any act done with intent to commit a crime, and tending but failing to effect its commission, and whether an attempt was made is determinable solely by the condition of the actor's mind and his conduct in the attempted consummation of that design." In that case the proof was that a man in a crowd of people put his hand in the pocket of a woman and drew it out empty.

In *People v. Lawton,* 56 N. Y. (Barbour), 126, the conviction of an attempt to commit burglary was sustained on evidence that the prisoner reconnoitered the premises and had an agreement with another party to enter the store, but when he arrived, doubting if the instruments that he had were sufficient to force an entrance, he sent off to get a crowbar, and before it arrived he was arrested. This evidence was held sufficient to procure a conviction for an attempt to commit a burglary, the Court saying, "It is true there must be more than a mere intent or design to commit an offense. There must be some ineffectual act towards the accomplishment."

That case is exactly in point here where the defendants did everything necessary for the manufacture of liquor except the procurement of the still, as to which they were frustrated by the interference of the officers. That case is duplicated by almost identical evidence in *People v. Southerland,* 173 N. Y., 122, where the defendants had provided themselves with suitable tools to commit burglary, but were arrested before they had committed any act other than providing the tools and going to the premises. These two cases are on "all fours" with this.

Indeed, we have two very recent cases in our own Reports almost identical. In *S. v. Blackwell,* 180 N. C., 733, *Allen, J.,* held for a unanimous Court that on testimony that the defendant was arrested at an obscure place, suited for the purpose of making illicit whiskey, with meal reduced to beer, and other preparations complete, except that there was no cap and worm on the still, and the defendant admitted that he intended to manufacture liquor for his own purpose, and was caught before he could go further, the conviction was sustained for the "unlawful manufacture," and not merely as in this case for an attempt.

In *S. v. Perry,* 179 N. C., 718, the facts were almost identical with those in this case. The evidence was that the defendants came in the early morning to a place where everything was complete for the illicit manufacture of intoxicating liquor except the still itself, which they brought and placed in position and cut wood, but before any other act was done they were arrested, and the Court held that these circumstances justified the verdict that "the defendants were engaged in the business of illicit distilling." In this case the defendants had done all these acts except the actual receipt of the still, which they were expecting when they were arrested, and of course were guilty of an attempt. Under *S. v. Perry* and *S. v. Blackwell, supra,* if the still had actually arrived and been put into position, though not into use, they would have been guilty of the offense itself and not of a mere attempt.

Indeed the oldest case on the subject of an attempt to commit a crime is *King v. Higgins,* 2 East, 5, decided in 1801, and which has been followed ever since by the courts, is conclusive on this subject. In that case the defendant solicited a servant to steal his master's goods, and was held guilty of an attempt. It was not alleged that the servant stole the goods or that any other act was done except the solicitation.

The crime of illicit distilling is one prompted by the profoundest contempt for the law of the land. It is necessarily always done with deliberation, with premeditation, clandestinely, secretly, and for the purpose of making a profit by the violation of the law. Subterfuge, evasion and concealment are accompaniments of the crime. Therefore, when there has been as in this case, full preparation, the placing in a secret place meal and bran, and the barrels, and the bargaining for a still, and an admission of the intention to make the whiskey, which was prevented only by the interference of the officers, every element of an attempt is shown. Had the defendants gone one step further and actually received the still and put it into position and been arrested even before operations were commenced, under the recent case of *S. v. Perry, supra,* they would have been guilty of the actual offense of the manufacture of whiskey. As it was, they were certainly guilty of an attempt. They had done all in their power and the interference of the law at the critical moment alone prevented the consummation of the greater offense.

The vast volume of poverty, crime and violation of law of every kind caused by intemperance has been so overwhelming that the people of the United States enacted an amendment to their Constitution forbidding the manufacture and sale of intoxicating liquor, which amendment was ratified by the unusual number of 45 out of 48 states. Such being the evil that it is intended to repress and the importance of its suppression in the estimation of the people of this country, certainly the laws enacted in pursuance of that amendment should be efficiently enforced. Evasions and subterfuge are the very essence of this offense, and when a party who has taken every step to violate the law and admits as in this case his intention to do so, and that he was prevented only from the execution of that intent by the arm of the law, surely he ought not to escape punishment for the attempt which he did not execute only because prevented by the prompt action of the sheriff.

There are offenses committed on sudden impulse or under great provocation or great inducement and openly, but there can be no such palliation as to this most ignoble offense which, being committed secretly, with deliberation, and for the sake of profit in defying the public will, can never be more than an attempt until by successful evasion of official supervision it has become a completed crime. It is necessary for its efficient suppression to seize the criminal when it is no more than an "attempt."

STATE EX REL. W. C. ROBERTSON v. FRANK JACKSON.

(Filed 22 February, 1922.)

1. **Elections—Quo Warranto—County Board of Canvassers—Prima Facie Case.**

In proceedings in the nature of a *quo warranto*, to determine the respective rights of the parties contesting for an office, the result of the election, as declared by the county board of canvassers, must be taken as *prima facie* correct. C. S., 5986.

2. **Appeal and Error—Reference—Findings—Evidence.**

The facts found by the referee as to the result of an election in proceedings in the nature of a *quo warranto*, and approved by the trial judge, are not subject to review on appeal when supported by competent evidence.

3. **Appeal and Error—Reference—Courts—Findings—Evidence—Facts—Legal Inferences.**

The trial judge may hear and consider exceptions to the referee's report, and make different or additional findings of fact, which are not reviewable on appeal unless there is no sufficient evidence to support them, or error committed in receiving or rejecting testimony upon which they are based, or some other question of law is raised with respect to such findings.

4. **Appeal and Error—Reference—Elections—Findings—Fraud.**

The question of fraud in the returns of the county board of canvassers as to those voting in an election, in proceedings in the nature of a *quo* *warranto*, to determine the rights of contestants for a public office, is eliminated on appeal, when the report of the referee, approved by the trial judge, finds the absence of fraud, upon competent evidence.

5. **Appeal and Error—Reference—Report of Referee—Findings—Exceptions—Counts.**

Where there are no exceptions filed to the findings of the referee, the trial judge may adopt them under the assumption that they are *prima facie* correct.

6. **Appeal and Error—Presumptions—Burden of Proof.**

On appeal from the findings and judgment of the referee or the trial judge, in a contested election case, they are assumed to be *prima facie* correct, with the burden on the appellant to show the contrary.

7. **Appeal and Error—Reference—Findings—Exceptions.**

Only such findings of a referee or of the trial judge as are excepted to by the appellant will be considered on appeal.

8. **Appeal and Error—Elections—Exceptions—Reference—Findings—Immaterial Matter.**

Exceptions of the defendant, in a contested election case, that the testimony of certain voters was incompetent to impeach the result declared by the county board of canvassers, become immaterial on appeal, when it appears that the referee has found the absence of fraud and against the relator, under competent evidence, which was approved by the trial judge.

9. **Appeal and Error—Reference—Conflicting Findings—Ultimate Facts—Evidence.**

The result declared by the county board of canvassers is *prima facie*, and presumptive evidence of its own correctness, and where the referee has sustained it, and this finding has been approved by the trial judge, the court on appeal cannot pass on the relative weight of the testimony or alleged inconsistencies of finding, but accept the ultimate findings as controlling.

10. **Elections—Votes—Felony—Constitutional Law.**

In a contested election case, a conviction of an offense under a local law prescribing punishment in the State's Prison, renders void the vote of the one so convicted, whether the indictment charged or failed to charge that the alleged offense was "feloniously" committed. Const., Art. VI, sec. 2.

11. **Elections—Votes—Felonies—Conviction—Statutes—Election of Prosecution.**

Where the eligibility of a voter at a contested election depends upon either a conviction under a local prohibition act or under the general act of 1908, now C. S., 411, the former prescribing the word "feloniously" selling spirituous liquor, etc., and the other not so prescribing it, a conclusion by the referee, approved by the court, that a charge in the indictment of the word "feloniously" was an election of the State to prosecute under the private act, and the failure of the use of this word, an election to prosecute under the general statute, was not error, the general statute expressly excepting from its provisions special or local acts relating to the subject.

12. Elections—Votes—Absentee Voters—Statutes.

Under the provisions of Public Laws of 1917, ch. 23, those who were within the county at the time of an election were not accorded the privilege of voting as absentee voters; and the votes of those who were within the county and cast by this method, before the amendment of 1919, now C. S., 5960, are invalid, and should not be counted.

APPEALS by relator and defendant from *Shaw, J.*, at September Term, 1920, of POLK.

Civil action, in the nature of a *quo warranto,* brought under C. S., 870, to determine the question of title to the office of sheriff of Polk County for the two-year period beginning in December, 1918, and ending in December, 1920.

The defendant and the relator were rival candidates for the office of sheriff of Polk County in the general election of 1918. The official returns, as received and declared by the canvassing board of said county, gave the defendant a majority of 2 votes; the result being 686 for the defendant and 684 for the relator. Whereupon, the election of the defendant was duly declared by the official board.

The relator then instituted this suit to contest the election of the defendant, alleging fraud and misconduct on a part of some of the poll holders, registrars, and judges of election. By consent, the case was heard before a referee, who found that the allegations of fraud had not been sustained, and that the correct returns of the number of legal votes cast in said election should have shown 643 for the defendant and 623 for the relator. In a supplemental report the referee deducted 4 votes, originally given to the relator, reducing his total number to 619. Both the relator and the defendant filed exceptions to the referee's findings of fact and conclusions of law; and the matter was heard by his Honor, T. J. Shaw, at the September Term, 1920, of Polk Superior Court, who found that the defendant received 654 legal votes and the relator 647, and, in accordance with said determination, rendered judgment in favor of the defendant. From this finding and judgment the relator and the defendant both appealed to this Court, each assigning errors.

Following the argument, and after a careful consideration of the record, and in order that we might more readily and clearly understand it, a *certiorari* was directed to his Honor below, asking that he enter a supplemental order or judgment with respect to certain rulings and findings originally made by him. In response to this request, an additional judgment was entered, in which his Honor concluded that the defendant should be credited with 668 legal votes and the relator with 652. To this supplemental order and judgment both sides have filed exceptions.

Quinn, Hamrick & Harris, McD. Ray, and W. A. Smith for relator.
Solomon Gallert and Shipman & Arledge for defendant.

STACY, J., after stating the facts as above: This proceeding is a civil action in the nature of a *quo warranto,* brought under C. S., 870, to determine the validity of the respective claims of the relator and the defendant to the office of sheriff of Polk County. The contest relates to the election held in the year 1918. In passing upon the numerous exceptions presented for our consideration, there are a few facts and principles which should be kept clearly in mind:

1. In the first place, the result of the election, as declared by the county board of canvassers, must be taken as *prima facie* correct. *Jones v. Flynt,* 159 N. C., 87. Under C. S., 5986, it is the duty of said board of county canvassers to "open, canvass, and judicially determine the returns," and to "pass upon all facts relative to the election, and judicially determine and declare the result of the same."

2. The findings of fact of a referee, approved by the trial judge, are not subject to review on appeal, if they are supported by any competent evidence. *Dorsey v. Mining Co.,* 177 N. C., 60; *Hudson v. Morton,* 162 N. C., 6; *Hunter v. Kelly,* 92 N. C., 285. Likewise, where the judge, upon hearing and considering exceptions to a referee's report, makes different or additional findings of fact, they afford no ground for exception on appeal, unless there is no sufficient evidence to support them, or error has been committed in receiving or rejecting testimony upon which they are based, or unless some other question of law is raised with respect to said findings. *Caldwell v. Robinson,* 179 N. C., 518; *Thompson v. Smith,* 156 N. C., 345; *Rhyne v. Love,* 98 N. C., 486. See, also, C. S., 579, and annotations collected thereunder.

3. In the instant case, the referee has found as a fact, and the same has been approved by the trial judge, that the allegations of fraud and misconduct have not been sustained; and the contrary is, therefore, found to be true. There is, then, no question of fraud or misconduct on the part of any of the election officials; and the case in the main reduces itself to a problem in simple arithmetic, or addition, after eliminating the ballots of all illegal voters and counting those who were denied the right to vote when they were entitled to do so.

It appears from the report of the referee that the official precinct returns in said election, as received, tabulated and declared by the board of county canvassers, were as follows:

	For Relator	*For Defendant*
Shields Precinct	107	226
Columbus Precinct	99	104
Tryon Precinct	109	165
Saluda Precinct	127	37
Mill Springs Precinct	66	89
Pea Ridge Precinct	32	18
Big Level Precinct	54	37
Jackson's Mill Precinct	90	10
Total	684	686

Upon the hearing the referee found that, after deducting the illegal ballots which had been cast in the election and adding the votes of those who had wrongfully been denied the right to vote, the relator and the defendant each received the following number of legal votes at the several voting precincts, to wit:

	For Relator	*For Defendant*
Shields Precinct	93	215
Columbus Precinct	92	89
Tryon Precinct	94	159
Saluda Precinct	120	34
Mill Springs Precinct	60	83
Pea Ridge Precinct	28	16
Big Level Precinct	51	37
Jackson's Mill Precinct	85	10
Total	623	643

In a supplemental report, the referee found that 4 votes, counted in his original report for the relator (2 in Columbus Precinct, 1 in Mill Springs, and 1 in Jackson's Mill), were illegal, and directed that they be deducted from the total number originally awarded to the relator, as above noted.

These findings of the referee were slightly modified by his Honor in passing upon the respective exceptions of the different parties; and, in the supplemental order made in response to the *certiorari* issued by this Court, 668 legal votes were awarded to the defendant and 652 to the relator. As we are unable to ascertain with certainty from the record in which precinct some voters, as alleged, were denied the right to vote and others voted illegally, from this point on we must deal with totals rather than with precinct returns in passing upon the different rulings and findings made by the trial court. This is rendered necessary because of the method employed by the referee and his Honor below in stating their conclusions and findings of fact. A different form of statement might have been somewhat clearer and more readily understood, but we must take the record as we find it.

In considering the many exceptions to the referee's report, his Honor below assumed at the outset that the findings and rulings of the referee were *prima facie* correct (*Barcroft v. Roberts,* 91 N. C., 363; *Green v. Jones,* 78 N. C., 265); and, in the absence of any objection or exception, the same were properly adopted as the findings of the court. *Mfg. Co. v. Lumber Co.,* 177 N. C., 404, and cases there cited; *Chard v. Warren,* 122 N. C., 75. Likewise, we shall assume, as we are required to do, that the findings and judgment of the Superior Court are *prima facie* correct; and the party alleging error must show it. *McGeorge v. Nicola,* 173 N. C., 707; *Marler v. Golden,* 172 N. C., 823, and cases there cited. We can only consider exceptions to the rulings of the court below in amending, making additional findings, and confirming or disaffirming the referee's report. *Perry v. Hardison,* 99 N. C., 21. And even then we can only correct errors of law. *Thornton v. McNeely,* 144 N. C., 622. The judge of the Superior Court, in the exercise of his revisory power, may "set aside, modify, or confirm, in whole or in part, the report of the referee, and the appellate jurisdiction attaches to his rulings in matters of law only." *Vaughan v. Llewellyn,* 94 N. C., 472.

The chief contest here and below was over the returns from Shields Precinct. It was alleged in the complaint that 152 voters (naming them) cast their ballots for the relator in said precinct, and that "by false and fraudulent manipulations, upon the part of some of the poll holders, only 107 votes were counted for the relator and a great number of them were either fraudulently and unlawfully not counted for relator, or fraudulently and unlawfully counted for the defendant." The principal evidence offered in support of these allegations was that of the specified voters themselves who undertook to testify, and a majority of them did say that they voted for the relator. The defendant objected to this evidence upon the ground that it was incompetent and should not have been received or considered, especially as the allegations of fraud were not sustained. He says the admission of such evidence amounted to the holding of a judicial election, under the guise of a contest, and is subversive of sound principles and contrary to the law of the land. But we deem it unnecessary to pass upon the competency of this evidence in the manner now presented, as it appears to have had but little or no weight with the referee. At any rate, he allowed the relator a smaller number of votes in Shields Precinct than was given to him by the official returns. Besides, there was other evidence in support of his findings. The question, therefore, seems to be academic so far as the instant case is concerned. For information, however, an examination of the following cases may be of interest. *Boyer v. Teague,* 106 N. C., 625; *People ex rel. Judson v. Thacker,* 55 N. Y., 525; *People v. Pease,* 27 N. Y., 45; *Major v. Barker* (Ky.), 35 S. W., 543; *Young v. Deming* (Utah), 33 Pac., 818; *Jenkins v. Board of Elections,* 180 N. C., 169; 9 R. C. L., 1150 *et seq.*

The relator also contends that inconsistent findings have been made with respect to the number of ballots cast for the opposing candidates in Shields Precinct. However this may be, suffice it to say, there is some evidence appearing on the record sufficient to support the ultimate findings of his Honor below. The result, as declared by the board of county canvassers, is within itself *prima facie* and presumptive evidence of its own correctness. *Wallace v. Salisbury,* 147 N. C., 58; *Bynum v. Comrs.,* 101 N. C., 412; *Gatling v. Boone,* 98 N. C., 573. We cannot pass upon the relative weight of the testimony, but it is our duty to accept the ultimate findings of fact where they are supported by any competent evidence at all. *Battle v. Mayo,* 102 N. C., 413, and cases there cited.

Coming, then, to the remaining exceptions, and for convenience we will start with the last, or supplemental judgment, and add to or subtract from the totals therein found, as our rulings on the different exceptions may affect or change the number of votes credited to each.

(*a*) The vote of Will D. Owens was counted for the relator; but, in a subsequent ruling, his Honor finds that this vote was illegal. Therefore, it should be deducted; 652 minus 1 equals 651.

(*b*) The votes of V. H. Calvert and G. S. Taylor were counted by his Honor for the relator and added to the total number of votes awarded to him by the referee; but these votes had already been included by the referee in his total of 93 in Shields Precinct. Referee's finding number 50 reads: "To the remainder must be added two votes which would have been cast by V. H. Calvert and G. S. Taylor, making the total of the relator 93." Hence, these two votes should be deducted; 651 minus 2 equals 649.

(*c*) The votes of J. E. Prince and 7 others were counted for the relator in sustaining in part his 13th exception, and 11 votes were counted for him in sustaining his 14th exception; but, as the referee had already included these in his 49th finding of fact, his Honor erred in adding them again, which resulted in counting them twice. They should, therefore, be deducted; 649 minus 19 equals 630.

(*d*) The votes of J. A. Hutcherson and Grayson Lovelace were counted for the relator, although in subsequent paragraphs it was stated that the court could not find for whom they voted. For the same reason, however, the votes of J. Leslie Miller and J. Rowland Gilbert were subtracted from the defendant's total. While these rulings would seem to be inconsistent, apparently to the defendant's disadvantage, yet we must assume that said votes have been correctly counted. There was some evidence ultra to support the addition in the one case and the subtraction in the other.

(*e*) The votes of Frank J. Henderson (exception 38), H. Bale Henderson (exception 39), Robert Connor (exception 58), Bill Russell (exception 62), and Bone Russell (exception 63), 5 in number, were counted for the defendant by his Honor in overruling the referee's 26th conclusion of law, as follows: "After 1 July, 1903, and before 1 January, 1909, the offense of making or selling liquor in Polk County (being punishable by imprisonment in the county jail or penitentiary) must be held to have been prosecuted under the act of 1903, whether the indictment charged or failed to charge the offense to have been committed feloniously." It would seem that these votes were properly excluded by the referee under the doctrine announced in *S. v. Hyman,* 164 N. C., 411; *S. v. Holder,* 153 N. C., 606; *S. v. Smith,* 174 N. C., 804, and under Article VI, section 2, of the State Constitution, which provides: "No person who has been convicted, or who has confessed his guilt in open court upon indictment, of any crime the punishment of which now is, or may hereafter be, imprisonment in the State's Prison, shall be permitted to vote, unless the said person shall be first restored to citizenship in the manner prescribed by law." Subtracting these votes from the total awarded to the defendant, 668 minus 5 leaves 663.

(*f*) The relator's 8th and 9th exceptions, bearing upon a kindred question, but somewhat different, to the one just considered, must be overruled. The following conclusion of law, as stated by the referee, was approved by the court below: "After 1 January, 1909, an indictment charging the 'felonious' sale of liquor in Polk County was an election on the part of the State to prosecute under said act of 1903, and an indictment failing to charge the 'felonious' sale was an election to prosecute under the act of 1908, or later public prohibition laws under which the offender is not punishable with imprisonment in the State's Prison." Section 7 of the act of 1908, now C. S., 3411, provides: "Nothing in this chapter shall operate to repeal any of the local or special acts of the general assembly of North Carolina prohibiting the manufacture or sale or other disposition of any of the liquors mentioned in this chapter, or any laws for the enforcement of the same, but all such acts shall continue in full force and effect and in concurrence herewith, and indictment or prosecution may be had either under this chapter or under any special or local act relating to the same subject." Thus it would seem that the referee's construction, as approved by the court below, is not only permissible, but is in keeping with the humane and proper interpretation of these criminal statutes. To hold otherwise would have the practical effect of withdrawing or exempting Polk

County from the operation of the general prohibition laws of the State; and this would be at variance with the declared intent and purpose of the Legislature. *Sheppard v. Dowling,* 127 Ala., 1; 25 R. C. L., 931.

(*g*) The votes of Otis Tony and 8 others were counted for the relator, and the votes of M. A. Bishop and 18 others (including the vote of E. B. Grice, though apparently not brought forward in assignments of error) were counted for the defendant, all of whom cast their ballots as absentee voters under Public Laws 1917, ch. 23, while in the county on the day of election. Some were sick, others about their work. We think these votes should have been eliminated from the count. Section 1 of the act in question provides: "That in all primaries and elections of every kind hereafter held in this State, any elector who may be absent from the county in which he is entitled to vote shall be allowed to register and to vote by mail as hereinafter provided." Thus it will be seen that the act as then in force applied only to those who were "absent from the county" on the day of election. The law in this respect was subsequently changed and amended (Public Laws 1919, ch. 322, now C. S., 5960 *et seq.*), but the present election was held under the 1917 statute. *Jenkins v. Board of Elections,* 180 N. C., 169. The principles announced in *Woodall v. Highway Commission,* 176 N. C., 377, in no way conflict with this position. Deducting these votes, we have: For the relator, 630 minus 9 equals 621; for the defendant, 663 minus 19 equals 644. This gives the defendant a majority of 23 votes, according to the legitimate findings of the referee and his Honor below.

No beneficial result would be accomplished by setting out in detail the exceptions still remaining, as they deal largely with questions of fact. There was some evidence tending to support the court's findings and rulings in each instance, and hence these exceptions must be overruled.

After a careful perusal of the entire record, we are convinced that the judgment in favor of the defendant, as herein modified, should be upheld.

On both appeals, modified and affirmed.

STATE v. J. E. BURNETT.

(Filed 22 February, 1922.)

1. Intoxicating Liquor—Spirituous Liquor—Arrest—Warrant—State Statutes—Federal Statutes.

A national prohibition officer, in making an arrest, is confined to the authority given him by the Federal statutes, and no additional power to make an arrest without a warrant can be conferred by our State statute, C. S., 4544, providing that a sheriff, etc., entrusted with the care and preservation of the peace, may arrest without warrant whenever they know, or have reasonable ground to believe, that a felony has been committed, etc.

2. **Same—Manufacture—Distillation—Misdemeanor—Acts in Presence of Officer—Criminal Law.**

The authority of a Federal prohibition officer to make an arrest is confined to the provisions of the National Prohibition Act, whereunder the unlawful distillation of spirits for the first offense is only a misdemeanor, and the authority to make arrest specifically referred to another Federal statute providing the same powers and protection, in making arrests, as that formerly conferred upon such officers for the enforcement of existing laws relating to the manufacture and sale of liquor under the laws of the United States, which permit an arrest without a warrant only when the person or persons charged are found by them in "the act of operating an illicit distillery."

3. **Same—Felony.**

A national prohibition officer was not charged with the duty of enforcing the Federal Lever Act, with reference to the manufacture or sale of spirituous liquor, making the offense a felony, nor clothed with the powers incident to such enforcement, before it was repealed.

4. **Same—Rules of Revenue Department—Courts—Judicial Notice.**

The rules and regulations of the Internal Revenue Department, when approved by the Secretary of the Treasury, and not unreasonable or in conflict with the statutes appertaining to the subject, are considered binding, and may be taken note of by the court, and thereunder a national prohibition officer is unauthorized to arrest without a warrant the person charged with unlawful distillery when such person was not therein engaged at the time of the arrest.

5. **Intoxicating Liquors—Spirituous Liquors—Arrest—Warrants — State Statutes—Federal Statutes—Courts—Jurisdiction.**

C. S., 4544, authorizing an arrest of the offender against the law applies only to peace officers of the State, and in the enforcement of the State law, and does not affect the conduct or powers of Federal officers unless the principles therein are extended to such officers by a Federal statute, when in the enforcement of a valid Federal law.

6. **Same—United States Marshal—Federal Prohibition Officers.**

The effect and purpose of Revised Statutes U. S., sec. 788, are restricted to United States Marshals and their deputies, and do not extend to national prohibition agents to arrest without warrants in the enforcement of the National Prohibition Act.

7. **Same—Felonies—Arrest by Private Persons.**

A Federal prohibition officer, acting under the National Prohibition Act, can derive no further authority to arrest an offender without a warrant than the Federal statute itself provides; and no further power can be acquired by him by virtue of our State statute, C. S., 4543, permitting such to be done by a private person, in case of felony, such as murder, rape, and the like, when the unlawful act has been committed in his presence.

8. Homicide—Murder—Arrest—Warrant—Instructions—Federal Prohibition Officers—Appeal and Error—Prejudicial Error.

Where, on a trial for murder, there was evidence that the deceased, a national prohibition officer, and another specially deputized, entered the premises of defendant and attempted to arrest the prisoner without a warrant for the unlawful distillation of liquor, when he was not actually engaged therein, and chased the prisoner with pistols drawn, and while fleeing, and in reasonably apparent danger of his life, the prisoner shot and killed the prohibition officer, an instruction to the jury that under the circumstances the deceased had the right to make the arrest without a warrant constitutes reversible error, for which a new trial will be granted on appeal.

APPEAL by defendant from *Bryson, J.*, at the July Term, 1921, of SWAIN.

The indictment is for murder of one J. H. Rose, a prohibition agent of the Federal Government, while the latter was engaged in the effort to arrest the prisoner for alleged violation of the Federal prohibition law. The prisoner was convicted of murder in the second degree, and from judgment on the verdict appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Thurman Leatherwood, Bourne, Parker & Jones, and Felix E. Alley for defendant.

HOKE, J. There was evidence on the part of the State tending to show that on the morning of 25 October, 1920, the deceased, a prohibition agent of the Federal Government, with two others, Charles Beck, an assistant deputized for the purpose, and J. M. Welch, a State deputy sheriff, went to the home of the prisoner in Swain County, about seventeen miles south of Bryson City, and found on the immediate premises two barrels of apple pomace in a state of fermentation; that Burnett, the prisoner, came up and said he was intending to make vinegar out of the pomace. Rose told him it was against the law to make vinegar in that way, as there was alcohol in it, etc. That Rose and Charlie Beck went over to prisoner's orchard and found five other barrels of pomace, and near there found a still place with fresh ashes, showing signs of use "since the rain." Going back to the house they found that Burnett had disappeared, and the visiting party went on to some other places in the neighborhood; that in the afternoon Rose and Charles Beck returned to home of defendant for the purpose of arresting him; that the prisoner at that time was at his crib near the house unloading corn or roughness, and when he saw the deceased and his deputy, the prisoner started to run, was called to several times to halt, but he moved around the barn; that Rose and deputy pursued, both having their pistols out, and as they came in view of prisoner around the barn, the latter fired from a straw stack where he had stopped and killed deceased; that he then ran on and Beck, the deputy, pursued, firing at him seven or eight times till he passed out of sight; that neither the deceased nor his deputy made any demonstration with their pistols till after deceased was shot, but had them in their hands, and Rose's pistol went off as he fell, mortally wounded, apparently without aim.

There were facts in evidence which seemed to permit the inference that Rose may have had a warrant, but none was exhibited at the time of the occurrence. Defendant, a witness in his own behalf, testified he was not engaged in making brandy at the time; that he intended to make some, but some one stole his still, and to keep his fruit from going to waste he had crushed his apples into pomace with the purpose of making vinegar, and did not know he was violating any law in doing this; that he had gone off when the parties went over into his orchard, but not with any purpose of flight, but only to drive his cattle up on the mountain to keep them off his crop, which was not under his fence, and this was his custom; that when he returned, the deceased and Beck and the deputy sheriff had gone somewhere and he ate his dinner and then went to hauling up his corn, and was at the crib unloading it when the deceased and his assistant returned and were coming towards him with their pistols out; that witness went towards and around the barn and the two pursued him with their pistols out and deceased fired one shot at witness, hitting him in the leg; that witness fell over the bars at the end of the barn and got his gun, which had been left near the straw stack in the morning when he had returned from a squirrel hunt; that at time witness fired, deceased was pointing his pistol at witness, and the other man also had a drawn pistol, and witness shot as the only thing he could do to save himself. That witness saw no warrant nor heard any claim of one, and heard no call to halt, and did not hear either of the men speak during the occurrence; that after witness fired the gun he continued his flight and was shot at several times by Beck until witness passed out of view, when he sat down and washed the blood off and tied up his leg where he had been wounded The wife of defendant testified that one of the men fired at her husband as he went towards the barn from the crib; that she did not hear them make any call to her husband to halt, but were advancing towards him with their pistols out.

On this, the evidence chiefly pertinent, the cause was submitted to the jury, and defendant, as stated, was convicted of murder in the second degree. While the court, in a clear and comprehensive charge, presented the case in every aspect of the testimony, and in the main correctly, we think there was error to the defendant's prejudice in an instruction that under a Federal statute, commonly known as the Lever Act, it was made a felony to use fruits or food material for the production of distilled spirits for beverage purposes, and that this being true, or if it were true on the facts as accepted by the jury, the deceased was empowered to arrest the prisoner without warrant, the State statute, C. S., 4544, providing that "a sheriff, coroner, constable, police, or other officer entrusted with the care and preservation of the peace may arrest without warrant whenever they know, or have reasonable ground to believe, that a felony has been committed or a dangerous wound given, that a particular person is guilty and may escape if not immediately arrested."

It seems that this Lever Act, constituting the felony as stated, chapter 53, 40 U. S. Statutes at Large, continued to be in force and effect till the spring of 1921, several months after this occurrence. See *Hamilton v. Distillery & Warehouse Co.*, 251 U. S., 146; Resolution Congress, 41 Statutes at Large, p. 1359. But if this be conceded, we are of opinion that the instruction of his Honor excepted to cannot be sustained for the reason that the deceased was not charged with the duty of enforcing the Lever Act, nor clothed with the power incident to such enforcement, but was a prohibition officer, charged only with the duties of enforcing the National Prohibition Act, and the Harrison Narcotic Act. Under this statute, chapter 85, 41 U. S. Statutes at Large, part 1, p. 305, sec. 29, the unlawful distillation of spirits for the first offense is only a misdemeanor, and in section 28 the officers charged with the enforcement of the law are given the same powers and protection in making arrests, etc., as that formerly conferred upon them for the enforcement of existent laws relating to the manufacture and sale of liquors under the law of the United States. Referring to the laws in question, Compiled Statutes, p. 220, being chapter 125, section 9, 20 Statutes at Large, p. 341, it will be noted that the power of arrest without warrant under cases like that presented here was only given when the officer found the person or persons charged in the "act of operating an illicit distillery."

And "then he shall be taken forthwith before some judicial officer and his case investigated."

We are confirmed in this view by the rules and regulations issued by the Internal Revenue Department for the guidance of its officials in enforcement of the Federal laws coming under its supervision and control. These regulations, when approved by the Secretary of the Treasury, and when not unreasonable or in conflict with the statutes appertaining to the subject, are considered as binding, and may be taken note of by the courts. *Campbell v. U. S.*, 95 U. S., 571; *S. v. R. R.*, 141 N. C., 846, and from a perusal of same, Regulations, No. 12, it appears that under the National Prohibition Act, the Federal Prohibition Commissioner is charged with the enforcement of the Federal laws relating to the production, sale, and taxation of spirituous liquors, etc., and also of the Harrison Narcotic Act, and that "the field officers or prohibition agents under him have jurisdiction of same class cases." And in reference to arrests without warrant, the authority is stated as follows:

"*Arrests without warrants.*—Section 28 of Title II of the National Prohibition Act (see article 4) has the effect of giving prohibition enforcement officers the same authority to arrest illicit distillers without warrants as is conferred by the act of 1879 (see article 270). An officer may also, in most jurisdictions, make an arrest without a warrant whenever he actually witnesses the commission of any offense under the prohibition statute and the arrest is made immediately thereafter. With respect to the procedure after such an arrest is made see below (preliminary hearings). An officer belonging to the Internal Revenue Service should not make arrests, however, except in cases arising under section 26 of the act (see article 54), so long as he is reasonably satisfied that the offender may be found when wanted."

In the case before us it appears from all the testimony that the prisoner at the time of the attempted arrest was at his corn crib on his own premises unloading corn into the crib from his wagon; that he was not engaged at the time in operating a distillery or in making use of fruits or grain in production of distilled spirits, and on these facts, as we understand them, he was not liable to arrest by deceased without a warrant duly issued for the purpose. *John Bad Elk v. U. S.*, 177 U. S., 529; *S. v. Bryant,* 65 N. C., 327.

In so far as the State statute is concerned, C. S., 4544, that in itself applied, and is clearly intended to apply to peace officers of the State, and in the enforcement of the State law, and does not affect the conduct or powers of Federal officers unless the principles therein are extended to such officers by a Federal statute, and when in enforcement of a valid Federal law. The only Federal statute called to our attention which purports to do this, Compiled Statutes U. S., 1918, sec. 1312; Revised Statutes U. S., sec. 788, restricts the effect and purpose to U. S. marshals and their deputies, and does not extend or apply to these prohibition agents, charged only, as stated, with enforcement of the prohibition and narcotic acts, and with the powers of arrest as therein given.

It could not be seriously contended that deceased, as a private citizen, could make this arrest because of knowledge that under the Lever Act a felony had been committed. Under our local statutes, C. S., 4543, such a power is restricted to felonies committed in the immediate presence of the person and applies only to the graver felonies, such as murder, rape, and the like. *S. v. Bryant, supra.* And there is no statute or principle that would extend it to deceased on the facts of this record, from which it appears he was acting and professing to act under a specific Federal statute which expressly defined his powers of arrest without warrant, restricting them to cases where an offender is presently engaged in the commission of the crime. Of a surety he could not have greater rights as a private citizen than the statute gave to him as an officer of the law.

On the facts as now presented, we are of opinion that no right to arrest the prisoner without a warrant has been shown, and for the error in the instruction the prisoner is entitled to a

New trial.

STATE v. SIDNEY A. KINCAID.

(Filed 22 February, 1922.)

1. **Removal of Causes—Transfer of Causes—Jurors Drawn from Other Counties—Courts—Discretion—Statutes.**

The trial judge, when refusing defendant's motion to remove an action for homicide to another county, may, in the exercise of his sound discretion, have the jurors summoned from any adjoining county, or from any county in the same judicial district, or have the jurors drawn from the jury box of such county. C. S., 473.

2. **Appeal and Error—Objections and Exceptions—Evidence.**

Exceptions to the ruling out of evidence admitted on the trial must be taken at the time, and they come too late to be considered on appeal when taken for the first time in appellant's statement of his case.

3. **Evidence—Nonexpert—Opinion Upon the Facts.**

A nonexpert eye-witness may state his opinions upon the collective facts when a person not an eye-witness cannot form an accurate judgment thereof from descriptive detail.

4. **Appeal and Error—Evidence—Nonexpert—Opinion—Questions of Law—Trials.**

Whether the withdrawal of competent nonexpert evidence after its admission is prejudicial error is a question of law.

5. **Homicide—Murder—Evidence—Appeal and Error—Husband and Wife.**

Where, upon the trial of a homicide, the prisoner's guilt for killing his wife is made to depend upon whether he intentionally inflicted the wound that caused the death, or whether it occurred through misadventure, and there has been rendered a verdict of murder in the second degree, and there was plenary evidence that the prisoner was very drunk at the time, and that his conduct towards her had theretofore been "kind always," "friendly," "all right," the action of the trial judge in withdrawing from the jury the testimony of a witness that the defendant had been "very fond of his wife," *is held*, under the facts of this case, not to have been prejudicial error, entitling the defendant to a new trial, though competent as a nonexpert opinion upon the facts.

6. **Homicide—Murder—Evidence—Husband and Wife—Intent.**

Where the defense of the prisoner, on trial for the capital felony of murder of his wife, is that their relationship had always been kind, considerate, etc., and that the homicide was not intentional, but the result of a misadventure when he was very drunk, etc., not knowing what he did, it is competent for the State to show that for seven years prior to the homicide the prisoner had maltreated his wife from time to time, and had addressed her with abusive language, the admissibility of such evidence being a matter of law, and its weight of credibility being for the jury.

7. **Homicide—Murder—Husband and Wife—Evidence—Admissions—Appeal and Error—Hearsay Evidence—Rumors—Harmless Error.**

Where, upon the trial for wife-murder, the witnesses have erroneously been permitted to testify that the general reputation was that the defendant had been convicted of seduction, and there was evidence, material to the inquiry, that his relationship to his wife had always been kind, etc., the subsequent admission of the husband that he had been convicted of seduction, renders the error harmless.

8. **Murder—Homicide—Instructions—Evidence—Inferences—Appeal and Error.**

Where, upon the trial of a homicide, there is evidence that the prisoner killed his wife with a knife, and the question is presented whether the deed had been done intentionally or by a misadventure or accident, the jury may convict upon finding that the killing with the knife was intentional, and an instruction that the jury may not infer the worst intent is properly refused.

9. **Instructions—Erroneous in Part.**

Where a part of a requested instruction consists of an abstract proposition of law inapplicable to the evidence, its refusal is not error, though it may have been correct in its other parts.

10. **Instructions—Requests for Instructions.**

A correct prayer for instruction is not required to be given to the jury in its identical words, and no error is committed by the trial judge if the matter or principle embraced therein is correctly and amply presented.

11. **Instructions—Contentions—Inadvertence.**

Where it is unmistakably plain that the court was stating the contentions of the party in his instructions, his mere inadvertence in referring to "the instructions of the court" will not be held for reversible error, either as an expression of opinion or a direction of the verdict.

12. **Appeal and Error—Objections and Exceptions—Instructions—Contentions.**

Exception to the statement of the contention of the parties entered after verdict comes too late to be considered on appeal.

CRIMINAL ACTION, tried before *Bryson, J.*, and a jury, at August Term, 1921, of BURKE.

The defendant was prosecuted for the murder of Lillie Kincaid, his wife, and from judgment pronounced on a verdict for murder in the second degree, he appealed.

The defendant's residence, which was in Chesterfield, five or six miles from Morganton, was occupied by the defendant, his wife, her mother, and the defendant's brother, whose mental condition was abnormal. The defendant conducted a mercantile business about two hundred and fifty yards from his residence. He and the deceased had been married about fifteen years. Her death occurred late on Monday, 18 July, 1921. On Sunday the defendant began to drink liquor, and on Monday he drank more freely until noon, when he began to take a drink every few minutes, and about 6 o'clock drank a pint; he then made a trip in a car to John's River, about two miles from home, and returned to his store between sunset and dark, whereupon he and Rader each took a drink, and the defendant, after a short interval, took the last drink before going home.

The deceased spent Monday in the store; she was there when the defendant returned from John's Creek; and after the defendant and Rader had taken a drink, the deceased called to the defendant, "Come on and let's go." The deceased went home alone, and the defendant tried to crank his car, but "it wouldn't fire." The deceased, after going home, told her mother that the defendant could not make the car go—"he's too drunk, he can't bring that car to the house." The deceased and her mother ate supper, and the deceased went twice to the store and returned each time alone, the last time about 9 o'clock.

The residence, not including the kitchen, was a two-story building with an ell on the east side; alongside the kitchen was a five-foot porch, from which a door opens into the hall of the main building; on this porch was a shelf about five feet long, and east of the porch and kitchen were the well-house and the pump. A few hours before the death of the deceased, her mother had left on the shelf referred to a knife which she had used in the preparation of vegetables. After a while the defendant came from the store to the porch at the rear of the house; the deceased went through the hall to the porch, and her mother went into her room to light a lamp; just as the light was struck, the mother of the deceased heard the defendant in a loud voice say, "Lillie, damn it, I won't take that," and afterward heard "a choking, gurgling noise"; running to the back door, she found the defendant and the deceased standing at the end of the porch; the defendant had his hands around the neck of the deceased, who was "up against the wall." The mother asked the defendant why he was choking the deceased, and he answered: "Mrs. Davis, you don't understand"; she then released his hand and exclaimed, "Lillie, Sidney has killed you," and in a hoarse voice the deceased responded, "No, he hasn't." Mrs. Davis went into the house for a lamp, and upon returning found the deceased and the defendant sinking to the floor, blood gurgling from the wound; the defendant held the deceased in his arms, kissing her as they gradually went to the floor, and after they had fallen, "screamed all he could scream," and said, "Surely I haven't done this."

The following is the defendant's testimony of the occurrence: "I went on home as usual, around the house the back way, the way I usually go, and when I got in the back side, the east side of the house, I met my wife just off of the back porch; as I recall, she says, 'You're going to keep on until you get on too much.' I put my arm around her neck and said, 'Oh, No, I'm all right,' walking in the porch and playing with her with something in my hand, coddling her about the shoulders; next I heard, Mrs. Davis spoke something; I don't recall what that was, it seems kinder like a dream that she said something; I just can't say positively what it was, whether 'What have you done?' or 'What have you done to Lillie?' or 'Have you killed her?'—I can't say just what she did say. I felt something, seemed to realize something had happened. I didn't know what it was, what the trouble was; I saw something lying on the shelf, apparently looked like a knife; I picked it up and threw it out like that (indicating).

"I remember lying down with my wife, seemed I could feel her begin to sink; I had her in my arms and we laid down somewhere there on the porch or in the door, I don't know just where. I didn't know what was said when we went down; I laid down; I don't know what was said or done.

"It is kinder like a dream; I remember seeing a few people there that night, several that I knew, heard their voices, and knew their voices; Dr. Riddle was one, Charlie Rader was one, one of the Conley boys, I don't recall which one now, Mr. Bright, I believe. I recall that somebody said something about the sheriff, and Mr. Bright said, 'He's here now, coming now.' Dr. Riddle's name, I recall, was mentioned; I don't know what was said about him. That's about all I recollect of the circumstances."

The next morning the defendant's spectacles were found on the shelf and the knife in the yard near the well.

The physician testified that on the left side of the neck of the deceased there was an incision between an inch and an inch and a quarter in length, and at right angles with the neck; that the appearance indicated a direct stab, and that a large blood vessel had been severed or cut.

There was evidence for the State tending to show that for several years the conduct of the defendant toward the deceased had been offensive and menacing, especially when he was under the influence of liquor; and for the defendant there was evidence tending to show that he had always been considerate and affectionate.

The defendant contended that he did not inflict the wound; that he did not know the knife was on the shelf, and that if he inflicted the wound he did it unintentionally.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

C. A. Jones, W. A. Self, S. J. Erwin, and S. J. Erwin, Jr., for defendant.

ADAMS, J. After the arraignment, his Honor, on motion of the solicitor, made an order that 75 jurors be summoned from Lincoln County; and to the denial of the request that these jurors be drawn from the box, exception was duly taken.

The statute provides, (1) that the presiding judge, instead of making an order of removal, may cause as many jurors as he deems necessary to be summoned from any adjoining county, or from any county in the same judicial district; and (2) that the judge may direct the required number of names to be drawn from the jury box in said county. C. S., 473. The obvious purpose is to authorize the court either to cause the jurors to be summoned by the sheriff or to direct that they be drawn from the box. While the adoption of the latter course is commendable, it is not always practicable, and the presiding judge, in the exercise of sound legal discretion, must determine by which of these methods the ends of justice may best be subserved.

On the cross-examination of Dr. Riddle, and on the direct examination of R. V. Michaux, the defendant proposed to show that, judged by the observation of the witnesses, the relation between him and the deceased had been one of love and affection. The proposed evidence was excluded. Thereafter, Dr. Riddle, in response to a question as to any observed fact or circumstance tending to show such relation, testified as follows: "I saw Mr. Kincaid when his wife was sick, and he made efforts to have something done, asked me to operate on her; she was at the hospital for an examination, and he seemed to be very anxious that something be done for her, and as I remember it a day was kinder set to do something for her, but nothing definite. Mr. Kincaid seemed to be anxious that something be done for his wife.

"I didn't see them going about together so often; saw them in town occasionally in a car. Mr. Kincaid brought her to town, the best I remember. I don't remember anything further that throws light on their relation to each other. He was very kind to her in my presence always."

This witness, referring to the defendant, further testified, "I always thought he was very fond of his wife." On motion of the solicitor, this expression was withdrawn from the jury.

R. V. Michaux testified as follows: "I visited at their home. I have seen them in their home and seen them at church, seen them at Marvin camp meeting two or three times, seen them here in Morganton, and in the store lots of times. I never saw them both in their home. I have seen them in the store several times; she was generally in the store when I was in there. At the times I have seen them together they seemed to speak to each other kindly, friendly, and all right when I saw them."

To the withdrawal of Dr. Riddle's conclusion that the defendant had been "very fond of his wife," the defendant first excepted at the time of preparing and serving his case on appeal. The delayed exception cannot avail him, for there is nothing that takes the case out of the general rule that exceptions not entered at the trial will not be considered on appeal. C. S., 590; *S. v. Braddy,* 104 N. C., 737; *S. v. Jones,* 69 N. C., 16; *S. v. Craige,* 89 N. C., 479; *S. v. Glisson,* 93 N. C., 509.

Not infrequently the opinions of nonexpert witnesses are received in evidence *ex necessitate.* It is sometimes impossible for a witness to state pertinent facts in such manner as to enable the jury to form a proper conclusion apart from the opinion of the witness. Indeed, the witness himself may not be able clearly to separate the circumstances from which he has derived his conclusion from the conclusion itself. The ground upon which opinions are admitted in such cases is that, from the very nature of the subject in issue, it cannot be stated or described in such language as will enable persons not eye-witnesses to form an accurate judgment in regard to it. Jones on Ev., sec. 360. Upon questions of science and skill opinions may be received from persons who are especially instructed by experience, study, and reflection in the particular science, art, or mystery to which the investigation relates; but upon a variety of unscientific questions there is also admissible the opinion of a nonprofessional witness, which is intended, not as a theoretical or scientific opinion, but as the expression of his judgment, based upon personal observation, and so understood at the time it is offered. *Comrs. v. George,* 182 N. C., 414; *S. v. Edwards,* 112 N. C., 901; *Arrowood v. R. R.,* 126 N. C., 629; *Burney v. Allen,* 127 N. C., 477; *S. v. Turner,* 143 N. C., 642; *Taylor v. Security Co.,* 145 N. C., 389; *Ives v. Lumber Co.,* 147 N. C., 307; *Bennett v. Mfg. Co., ibid.,* 620; *Britt v. R. R.,* 148 N. C., 40; *Murdock v. R. R.,* 159 N. C., 131; *Clary v. Clary,* 24 N. C., 78.

While his Honor might have admitted the proposed answer of the witnesses, the question presented here is whether its exclusion wrought such prejudice to the defendant as entitles him to a new trial. We recognize the principle, fundamental in our jurisprudence, that the jury ordinarily must determine the weight of the evidence; but whether admitted evidence is substantially equivalent to that which is excluded, although not *in ipsissimis verbis,* and whether in view of all the evidence there has been prejudicial error are questions of law to be decided by the court. At the time the proposed evidence was excluded the defendant was on trial for the capital felony, one essential element of which is premeditation; but he was convicted, not of the capital felony, but of murder in the second degree. It was argued, however, that the proposed evidence was competent, not only on the question of deliberation, but on the question whether the defendant intentionally inflicted the wound, or whether the homicide occurred through misadventure; and that the exclusion of the evidence was prejudicial to the defense. Does not the evidence which was admitted resolve this contention against the defendant? He insists that one of the crucial questions involved the relation that had existed between him and his wife. Had it been a relation of "love, respect, and affection; or of hatred, contempt, and bitterness"? Certainly the language of Dr. Riddle and of Michaux was sufficient to dispel any doubt in the mind of the jury as to whether they had regarded the relation between the defendant and the deceased as that of love, hatred, or indifference. We cannot hold for reversible error the substitution of the words "kind always," "kindly, friendly, and all right" for the words "love and affection," as descriptive of the defendant's disposition toward the deceased.

What has been said applies also to exceptions fourteen, twenty, and twenty-two. Mrs. Hood and Mrs. Conley minutely told of their association with the defendant and his wife—Mrs. Hood testifying that "each treated the other nice"; and Mrs. Conley that "they always seemed kind to each other." The mere statement by each witness as to the subjective impression produced by the appearance of the defendant and the deceased in the church yard more than two months before the homicide is not ground for a new trial; and the question asked Mrs. Davis was so indefinite as to preclude the necessity of discussing it.

There are several exceptions which relate to the admission of evidence tending to show the defendant's maltreatment of the deceased, or offensive language addressed to her from time to time during a period of several years next preceding the death.

It will be noted that when the evidence was introduced the defendant was prosecuted for the capital felony. In *S. v. Rash,* 34 N. C., 382, *Justice Nash* used this language: "Ordinarily the eye of suspicion cannot turn upon the husband as the murderer of his wife; and when charged upon him, in the absence of positive proof, strong and convincing evidence—evidence that leaves no doubt on the mind that he had toward her that *mala mens* which alone could lead him to perpetrate the crime—is always material. How else could this be done than by showing his acts toward her, the manner in which he treated her, and the declarations of his malignity? . . . In the domestic relation, the malice of one of the parties is rarely to be proved but from a series of acts; and the longer they have existed and the greater the number of them, the more powerful are they to show the state of his feelings. A single expression and a single act of violence are most frequently the result of temporary passion, as evanescent as the cause producing them. But a long continued course of brutal conduct shows a settled state of feeling inimical to the object. We are of opinion, then, that his Honor did not err in receiving the testimony objected to, because malice may be proved as well by previous acts as by previous threats, and often much more satisfactorily. Roscoe's Crim. Ev., 96, 740; 2 Phil. on Ev., 498." *S. v. Gailor,* 71 N. C., 88; *S. v. Wilkins,* 158 N. C., 603.

The evidence was offered for the purpose of showing intermediate and recurring misconduct of the defendant, and while its weight was to be determined by the jury, the question of its competency was properly decided by the court. *S. v. Johnson,* 176 N. C., 722.

R. V. Michaux testified that the general character of the prisoner was good, and R. J. Hallyburton and T. N. Hallyburton that it was good as to truth and honesty. On cross-examination Michaux was permitted to testify that he had heard that the defendant had been tried for seduction, but had never heard of his conviction; and each of the Hallyburtons, that the defendant had the general reputation of having been convicted of seduction.

If it be granted that this evidence should have been excluded, we are of opinion that the error was cured by the subsequent admission of the defendant. In *S. v. Barrett,* 151 N. C., 666, a witness for the State was asked on the direct examination whether he had opposed the defendant's application for membership in a lodge. The witness answered in the affirmative, and assigned as his reason that the defendant had been convicted and imprisoned. Concerning the court's refusal to strike out the impeaching clause in the answer, *Justice Brown* said: "It was entirely competent for the State to show motive upon the part of the defendant to burn the barn occupied and used by the witness, and to that end it was proper to show that bad feeling existed, and the reason for it, but that part of the reply of the witness in which he stated that defendant had been convicted of stealing and sent to the chain-gang should have been excluded, and the jury carefully cautioned not to regard it.

"The State had no right at that state of the trial to put so damaging a fact in evidence. The defendant had not put his character in issue at that time. But we think the error entirely cured by subsequent proceedings.

"The defendant was examined as a witness in his own behalf, and testified that he had been indicted for stealing corn and served four months on the chain-gang for it."

In the case at bar the defendant, on cross-examination, said: "I have been in court before, accused of seduction; I was not guilty; I was convicted and sentenced to the penitentiary. I was convicted on the charge of seduction in 1905 or 1906, is my recollection. After my conviction here, I was sustained in the Supreme Court, I think; I've forgotten just how it was. As a matter of fact, that case was settled by a money consideration." Here is an express admission of the evidence to which the defendant had previously objected.

The eighth request for instructions embodies a summary of the defendant's contentions as to the relations hereinbefore referred to, and as to the question whether the infliction of the wound was intentional or accidental. We are of opinion that his Honor's charge upon these contentions neither included nor omitted anything to the prejudice of the defendant.

The prisoner requested the following instruction: "It is neither charity nor common sense nor law to infer the worst intent which the facts will admit of if upon a fair consideration of the evidence, a fair and reasonable inference, consistent with his innocence, may as reasonably be deduced as an inference adverse to him and consistent with his guilt. In other words, the law leans to the presumption of innocence and requires that a jury shall be satisfied beyond a reasonable doubt of the guilt of the accused before a verdict of guilty can be rendered. If, therefore, upon certain evidence offered in a cause, a conclusion unfavorable or adverse to the prisoner and consistent with his guilt may reasonably be drawn, and on this same evidence a conclusion favorable to the prisoner and consistent with his innocence may be reasonably drawn, it is the duty of the jury to adopt that inference favorable to the prisoner and consistent with his innocence."

The first sentence is an excerpt from the dissenting opinion in *S. v. Neely,* 74 N. C., 431. There the defendant was prosecuted for assault with intent to commit rape; and *Justice Rodman,* emphasizing the proposition that the criminal intent must be proved, said that if the facts should reasonably admit the inference of an intent which, though immoral, was not criminal, it would be neither charity nor common sense nor law to infer the worst intent. In *S. v. Massey,* 86 N. C., 660, and in *S. v. Hawkins,* 155 N. C., 472, the language of *Justice Rodman* is again applied in a discussion of the criminal intent. But the question here was not whether the defendant inflicted the wound with any particular intent, but whether in fact he inflicted it, and if so, whether intentionally or by misadventure; and the jury had the right, if they found that the defendant used the knife, to infer, unless otherwise convinced, that he did so intentionally. Moreover, if it was intended that the prayer should apply to the question, whether the wound was intentional or accidental, the legal proposition is erroneous. It inferentially imports that each of the hypotheses is equally reasonable, or even if the State's hypothesis is more reasonable than the defendant's, the humanity of the law required the jury to accept the less reasonable and acquit the defendant. In other words, the prayer is subject to the criticism made by the *Chief Justice* in *S. v. Rogers,* 166 N. C., 390. There he said: "The remark (of *Justice Rodman*) does not bear the meaning which the defendants seem to attribute to it, that when upon the evidence if the jury believe it one way they should find the defendant not guilty, and if the contrary belief prevails, the jury should find the defendant guilty, they must find according to the humanity of the law that he is not guilty."

Besides, a part of the instruction requested consists of an abstract proposition of law which is not applied to any particular phase of the evidence. *Edwards v. Tel. Co.,* 147 N. C., 126; *McAdoo v. R. R.,* 105 N. C., 140; *Emry v. R. R.,* 102 N. C., 209; *Meredith v. Coal Co.,* 99 N. C., 576. These objections are sufficient to exclude the entire prayer, even if a part of it was correct; for where a portion of an instruction is erroneous, the court need not give so much of it as is good. *S. v. Neal,* 120 N. C., 613; *S. v. McDowell,* 145 N. C., 563.

We have compared with the charge each of the remaining requests and find that the substance of every material principle stated in them—certainly every material principle to which the defendant was entitled—is contained in the instructions given. The court did not adopt the language of each request, and was not required to do so. It is an established rule of practice that a judge is not bound to give instructions in the identical words of a request, if the matter or principle embraced therein is correct and amply presented. *Carter v. R. R.,* 165 N. C., 253; *S. v. Tate,* 161 N. C., 285; *S. v. Price,* 158 N. C., 641.

The defendant excepted to the following part of his Honor's charge: "The State says and insists that the evidence, considering the facts and circumstances, the argument of counsel, and the instructions of the court, involuntarily lead your minds to the conclusion that the defendant inflicted the wound, and that it was not done in play, or in accident, that it was intentional, that such act was unlawful, and that it was with malice, if not with premeditation and deliberation." The defendant contends that the reference to the "instructions of the court" is nothing less than the court's intimation of the defendant's guilt—that this instruction expressed the sentiment and opinion of the presiding judge. It will be observed that the paragraph complained of was the recital of certain contentions made by the State, not the application to the evidence of any principle of law; and it is evident that reference to the instructions of the court was a mere inadvertence. It cannot reasonably be construed either as an expression of opinion or as a direction of the verdict. *S. v. McNeill,* 93 N. C., 552. In addition, an objection to the court's statement of the contentions of the parties cannot first be made after verdict. *Phifer v. Comrs.,* 157 N. C., 150; *S. v. Tyson,* 133 N. C., 692; *S. v. Davis,* 134 N. C., 633.

We have carefully considered each of the remaining exceptions. Some apply exclusively to murder in the first degree, and the others require no discussion. The experienced counsel for the defendant have been diligent in his behalf, and the jury, under the comprehensive charge of the court, have returned a verdict for the lesser degree of murder. We think the defendant has no just reason to complain. Perusal of the entire evidence convinces us that he had no really substantial ground for contending either that the homicide was accidental, or that he did not inflict the wound, or that the deceased, for the purpose of alarming and reforming him, seized the knife and in some unexplainable way brought on her death. These contentions are based on possible inferences rather than on logical deductions from material evidence. Indeed, after scrutiny of the record from a legal viewpoint, we may safely assert, without usurping the functions of the jury, that from all the circumstances disclosed by the evidence only one rational theory may be evolved. However much, in the natural exercise of his faculties, the defendant may have loved his wife, it is not to be doubted that under the influence of drink he took her life. With brain excited, but not to the extent of frenzy, with judgment perverted but not dethroned, with will impaired but not destroyed, upon meeting her at the porch and hearing her mild reproof, he refused to indulge the normal impulse of "love and affection." The enormity of the deed began to temper his mind only when his wife, "with woman's faith and woman's trust," declined to admit his guilt, and fell to the floor. It was then that the "choking and gurgling noise" of his dying companion no doubt roused his sluggish sensibilities to the avenging cry, "Surely I haven't done this!" and his laggard affection, a moment too late, to the unavailing tribute of caresses and tears.

We find no reversible error, and this will be certified to the Superior Court of Burke County.

No error.

STATE v. FRED BRINKLEY AND ALBERT BRINKLEY.

(Filed 22 February, 1922.)

1. **Appeal and Error—Criminal Law—Objections and Exceptions—Evidence—Nonsuit.**

An exception to a motion to dismiss in a criminal action taken after the close of the State's evidence, and renewed by defendant after the introduction of his own evidence, does not confine the appeal to the State's evidence alone, and a conviction will be sustained under the second exception if there is any sufficient evidence on the whole record of the defendant's guilt. C. S., 4643.

2. **Homicide—Evidence—Dying Declarations—Conspiracy—Nonsuit.**

Where, upon the trial of two defendants for murder, there is evidence that one of them struck the deceased with a rock that caused his death, in the presence of the other, with circumstances tending to show that the other was aiding and abetting the assault, with evidence of the dying declaration of the deceased, "Boys, you have killed me; I did not think you would do it," a motion of defendants to dismiss is properly refused.

3. **Evidence—Dying Declarations.**

An exception to the admission of dying declarations, in an action for a homicide, that they were incomplete to the prejudice of the defendants, cannot be sustained, where the witness has testified to them in full, they were sufficient for the purpose of conviction with the other evidence, and the incompleteness objected to was caused by the dying condition of the declarant.

4. **Homicide — Criminal Law — Deadly Weapon—Evidence—Matters in Excuse—Burden of Proof.**

Where, upon the trial of murder, it is admitted by the defendant, or established as a fact, that, with a deadly weapon, he struck the blow that resulted in death, the law presumes malice, and the burden then rests upon the defendant, throughout the trial, to show such facts or circumstances as will reduce the degree of the offense, or acquit him thereof. The rule as to the burden of proof in civil actions does not apply.

5. **Homicide—Murder—Criminal Law—Evidence—Deadly Weapon—Conspiracy—Manslaughter—Trials.**

The evidence on this trial for murder that the deceased had money which he lost to the two defendants while gambling with them at their invitation, the quarrel between him and defendants, their withdrawal together, the deceased walking between them, the infliction of the mortal wound by one of the defendants, and the dying declaration of the deceased, "Boys, you have killed me," *is held* sufficient, with the other evidence, of a conspiracy between the defendants, and to convict the one striking the mortal blow of murder in the second degree and the other of manslaughter.

6. **Homicide—Murder—Evidence—Conspiracy.**

Where a conspiracy to commit the homicide accomplished has been proven on the trial, the acts and declarations of each defendant in furtherance of the common illegal design are competent against both.

7. Same—Appeal and Error—Harmless Error.

Where, upon a trial for conspiracy resulting in death, it is established that one of the two defendants killed the deceased with a deadly weapon in the presence of the other, without just provocation or show of resistance, the dying declaration of the deceased that he had no knife is consistent with the position that none was used, and its exclusion is not prejudicial error.

8. Evidence — Witnesses — Subpœnaed — Appeal and Error—Harmless Error.

Where, upon the trial for a homicide, the testimony of a witness for the defense has been excluded, refusal of the court to permit the defendants to show that this witness had also been subpœnaed by the State, and not introduced by it, is not reversible error.

9. Instructions—Evidence—Expression of Opinion—Statutes.

Where there is evidence of conspiracy of the two defendants on trial for murder, with that of deceased's dying declaration, "Boys, you have killed me," a requested instruction that the declarations raised a doubt as to which one had struck the fatal blow, and that both defendants should be acquitted if the jury should be in doubt, is an expression of opinion upon the evidence, forbidden by the statute, especially when it has been admitted that a certain one of them had done so.

10. Appeal and Error—Objections and Exceptions.

An exception to the analysis of the contention of the parties in the court's instructions comes too late after verdict.

11. Instructions—Contentions—Appeal and Error—Harmless Error.

The judge in his charge to the jury is not required to recite in detail all of the prolix testimony of the witnesses in stating the contentions of the parties, and his charge will not be held for error if he substantially submits them without unduly stressing those of one of them, and is not otherwise prejudicial to the appellant.

12. Homicide—Murder—Manslaughter—Evidence—Intent—Conspiracy.

Where, upon the trial of murder, it is admitted that one of the defendants struck the fatal blow with a deadly weapon, in the presence of the other, who was aiding and abetting him, it is permissible for the jury to find for their verdict that the one who struck the blow was guilty of murder, and that the other, being without the intent to kill, was guilty of the less offense of manslaughter.

CRIMINAL ACTION, tried before *Lane, J.*, and a jury, at July Term, 1921, of CATAWBA.

Defendants were indicted for the murder of Homer Barringer. The State waived a verdict for murder in the first degree, and requested a verdict of murder in the second degree or for manslaughter.

There was evidence tending to show, and it is admitted in the brief of the defendants, that Albert struck the deceased in the forehead with a rock, inflicting a wound which resulted in his death. There was evidence tending to show that the deceased said in his dying declaration that the wound had been inflicted by the defendant Fred. Albert was convicted of murder in the second degree, and Fred of manslaughter. Both defendants appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Wilson Warlick, Self, Bagby & Aiken for the defendants.

ADAMS, J. After the State had produced its evidence and rested its case, the defendants moved to dismiss the action for want of sufficient evidence to sustain the prosecution. They excepted to the court's denial of their motion and introduced evidence, and at the close of all the evidence again moved for judgment as of nonsuit. To the refusal of the latter motion they excepted, and now insist that they are entitled to the benefit of the first, as well as the second exception. Both the terms of the statute and the decisions of the Court are adverse to this argument. The defendants are entitled to the benefit only of the latter exception. C. S., 4643; *S. v. Killian,* 173 N. C., 793. Consideration of the latter exception, therefore, includes all the evidence. For this reason the motion to dismiss the action cannot avail the defendant Albert Brinkley, because he admits that he struck the deceased with a rock; nor the defendant Fred (1) because the dying declaration of the deceased was evidence for the jury, and (2) because there was some evidence of a conspiracy or concert of action between the defendants. True, the defendants insist that the dying declaration should have been excluded because it was fragmentary; but the cases cited to sustain this conclusion do not apply to the evidence, for they merely decide that where a witness relates a part of a conversation in behalf of one party, the opposing party is entitled to the whole conversation. But here the witness related the entire dying declaration; and the fact that the deceased became too weak "to tell the whole story," and then fell into unconsciousness does not render incompetent the declaration he made after saying, "I know I am going to die." *S. v. Shouse,* 166 N. C., 306; *S. v. Williams,* 168 N. C., 191; *S. v. Watkins,* 159 N. C., 482; *S. v. Laughter, ibid.,* 488.

The judge instructed the jury in substance that the defendant Albert admitted that he struck the mortal blow, and that the burden was upon him "all the way through" to show mitigating facts and circumstances to reduce the crime, and to make good his plea of self-defense. To this instruction the defendants objected on the ground that the burden of proof does not shift on establishing a *prima facie* case by the State, but continues on the State throughout the trial. His Honor further instructed the jury in substance that the intentional killing of a human being with a deadly weapon implies malice, and that the burden then rests upon the defendant to show to the satisfaction of the jury facts and circumstances sufficient to excuse the homicide or to reduce it to manslaughter. This is a correct legal proposition, and the charge must be considered in its entirety. In *S. v. Capps,* 134 N. C., 627, it is said, "There is no principle in the criminal law better settled than that, where the killing with a deadly weapon is admitted, or proved, in the sense that it is established as a fact in the case, the law implies or presumes malice, and at common law the killing, if nothing else appears, is murder. *S. v. Willis,* 63 N. C., 26; *S. v. Johnson,* 48 N. C., 266; *S. v. Brittain,* 89 N. C., 481. When this implication is raised by an admission or proof of the fact of killing, the burden is upon the defendant of showing all the circumstances of mitigation, excuse or justification to the satisfaction of the jury. *S. v. Johnson* and *S. v. Willis, supra; S. v. Vann,* 82 N. C., 631; *S. v. Barrett,* 132 N. C., 1005. And that burden continues to rest upon him throughout the trial. *S. v. Brittain, supra.*" And in *S. v. Lane,* 166 N. C., 339: "The burden is on the defendant to establish such facts to the satisfaction of the jury, unless they arise out of the evidence against him. This rule has been uniformly adhered to by this Court in indictments for homicide. *S. v. Quick,* 150 N. C., 820. This principle has been reiterated by us in more recent cases. *S. v. Worley,* 141 N. C., 764; *S. v. Yates,* 155 N. C., 450; *S. v. Rowe, ibid.,* 436; *S. v. Simonds,* 154 N. C., 197; *S. v. Cox,* 153 N. C., 638; *S. v. Fowler,* 151 N. C., 731; and formerly in *S. v. Clark,* 134 N. C., 698; *S. v. Brittain,* 89 N. C., 481." In North Carolina no principle in the law of homicide is more firmly established than this. *S. v. Wilcox,* 118 N. C., 1131; *S. v. Fowler,* 151 N. C., 731; *S. v. Hagan,* 131 N. C., 802; *S. v. Brittain,* 89 N. C., 501; *S. v. Cameron,* 166 N. C., 379; *S. v. Orr,* 175 N. C., 773; *S. v. Spencer,* 176 N. C., 715. In *White v. Hines,* 182 N. C., 275, in discussing the burden of proof in civil actions this Court held that the rule therein stated was not intended in any way to modify the well established principles applying to the law of homicide.

After stating certain contentions submitted by the State, his Honor charged the jury as follows: "If you find that the defendants entered into a common enterprise, a joint enterprise there, and that they both wilfully entered into a combat with this man, fought him wilfully and wrongfully, and assaulted him with a deadly weapon, struck him a blow which resulted fatally, without excuse or justification, you will find them guilty of murder in the second degree, unless they have shown to your satisfaction such facts and circumstances as would reduce it to manslaughter by rebutting and doing away with the element of malice." To this instruction the defendants excepted on the ground that the evidence did not justify any theory or contention that both the defendants fought or assaulted the deceased, or that there was concert of action between them at or preceding the time the mortal blow was inflicted. We are not prepared to concur in this conclusion. Testimony as to what took place between the defendants and the deceased at Newton on the day before the homicide and afterward; as to "a handful of bills" exhibited on Saturday by the deceased in the presence of the defendants; as to the defendants' suggestion that he should go to Fred's house on Sunday and play cards with them; as to Fred's promise to provide one-half gallon of liquor; as to the drinking, and shooting of dice; as to the game of poker which, begun at 5 in the afternoon was continued by moonlight until 10 o'clock; as to the loss of money by the deceased and an effort to borrow more; as to the quarrel between him and Albert in Fred's presence; as to their withdrawal from the woods together—Albert followed by the deceased and the deceased by Fred—and their conduct on the way: as to the mortal blow and the outcry of the deceased, "Boys, you have killed me; I did not think you'd do it"—these and other circumstances constituted evidence for the jury on the question whether the defendants had previously conspired together, or whether at the time the mortal blow was given they were acting in concert. If the alleged conspiracy was established, the acts and declarations of each of the defendants in furtherance of the common illegal design were admissible against both. *S. v. Jackson,* 82 N. C., 565; *S. v. Anderson,* 92 N. C., 732; *S. v. Brady,* 107 N. C., 828; *S. v. Mace,* 118 N. C., 1244. The exceptions relating to this instruction cannot, therefore, be sustained.

The court's refusal to permit the defendant Fred Brinkley to testify that the deceased said a short while after the blow was given that he did not have his knife, and the court's refusal to permit the defendants to show that Preston Drum, who was examined for the defendants, had been subpœnaed by the State, cannot be assigned for reversible error. As to the former, if the declaration of the deceased had been admitted, it would have been entirely consistent with the theory that he had not attempted to use a knife, and its tendency to corroborate Fred or any other witness would have been negligible; and as to the latter, the principle announced in *S. v. Harris,* 166 N. C., 243, and other cases, would not apply for the reason that there is nothing in the record to show that the State would not have introduced Preston Drum as a witness in rebuttal. As said in *S. v. Roberson,* 150 N. C., 840, "We are of opinion that the rejected evidence tended to throw no light upon the real question at issue, and could not possibly have been of any value to the defendants had it been admitted."

The defendants requested the court (1) to instruct the jury that if they accepted the testimony offered by the State as to the dying declaration of the deceased, this testimony would be effective to raise a reasonable doubt as to the guilt of Albert; and (2) that if the jury should be in doubt as to which of the defendants struck the mortal blow, both defendants should be acquitted. These prayers were properly refused; the first embodies an expression as to the weight of the evidence; besides Albert admitted and Fred testified that Albert struck the mortal blow.

The defendants excepted also to the court's analysis of certain contentions; but an exception of this character cannot be entered first after verdict; it must be taken during the charge or at its conclusion. *Phifer v. Comrs.,* 157 N. C., 150; *S. v. Tyson,* 133 N. C., 692; *S. v. Davis,* 134 N. C., 633; *Green v. Lumber Co.,* 182 N. C., 681.

We have carefully examined all the prayers for instructions which were tendered by the defendants in connection with the charge of the court, and are of opinion that his Honor submitted to the jury, in substance at least, all the contentions of the defendants, and did not unduly stress the contentions of the State. "To permit a party to ask for a new trial because of an omission of the judge to recite all the details of prolix testimony, or for an omission to charge in every possible aspect of the case, would tend not so much to make a trial a full and fair determination of the controversy as a contest of ingenuity between counsel." *Boon v. Murphy,* 108 N. C., 191. His Honor was careful to instruct the jury as to the defendant Fred that the burden was upon the State to satisfy the jury beyond a reasonable doubt of his participation in the difficulty. The jury evidently concluded from the admission of Albert that he struck the mortal blow with a rock, and that, failing to show such facts and circumstances as were sufficient to excuse the homicide or to reduce it to manslaughter, he was guilty of murder in the second degree; and that Fred aided and abetted Albert, but not with intent to kill, and was therefore guilty only of manslaughter. 21 Cyc., 694.

Upon review of the entire record, we find no reason for interfering with the verdict and judgment of the court.

No error.

STATE v. RAS SMITH.

(Filed 1 March, 1922.)

1. Intoxicating Liquor—Spirituous Liquor—Evidence—Nonsuit—Trials.

Evidence upon the trial for the unlawful and wilful manufacture of whiskey and for aiding, assisting and abetting parties in the said manufacture, that when the officers, upon information received, raided the still there were several participants there who ran away, unidentified, but one of them dodged and ran back across a ditch and into a pond, making tracks in the mud, apparently those of tennis shoes, and that later in the night the defendant was met by the officers in a road near his home with his clothes wet and wearing wet tennis shoes, and having a "testing vial" of the whiskey, etc., is sufficient to sustain a verdict of conviction. C. S., 3409.

2. Same.

The rejection of evidence as to the quantity of cotton or corn the defendant, tried for the unlawful manufacture of liquor, etc., C. S., 3409, had raised on his farm that year, is of irrelevant testimony, and its exclusion not erroneous.

3. Appeal and Error—Objections and Exceptions—Assignments of Error.

Exceptions to the trial must be properly set out in the assignments of error, to be considered on appeal, and it is insufficient if the assignment merely refers to the pages where the excluded evidence and the parts of the charge excepted to can be found.

4. Appeal and Error—Instructions—Contentions.

The recital of the testimony of certain witnesses in the judge's charge to the jury is not objectionable, alone, as singling out the testimony of these witnesses or attaching special weight to it.

5. Evidence—Witnesses Interested in Result—Instructions.

Where the defendant's wife or other near relatives have testified in his behalf on a trial for manufacturing, etc., liquor, in violation of our statute, C. S., 3409, it is not error for the judge to charge the jury to receive their testimony with a degree of caution, to closely scrutinize and scan it, because of their interest in the verdict, when followed by the instruction to give it the same credibility as that of a disinterested witness if they were satisfied of its truth.

6. Appeal and Error—Verdict—Weight of Evidence—Motions—Court's Discretion.

The refusal of the trial judge to set aside a verdict as being against the weight of the evidence is not reviewable on appeal.

7. Appeal and Error—Objections and Exceptions—Argument.

Exceptions presented only in the argument of counsel before the Supreme Court will not be considered.

8. Intoxicating Liquor—Spirituous Liquor—Manufacture—Aiding and Abetting—Verdict—Judgment.

The appellant, convicted on his trial of aiding or abetting in the manufacture of whiskey on one count of the indictment, C. S., 3409, may not complain because he was tried on another count of the same bill for the unlawful manufacture of liquor and acquitted, there being sufficient evidence to sustain a conviction on each one.

APPEAL by defendant from *Cranmer, J.*, at November Term, 1921, of LEE.

The defendant was indicted under C. S., 3409 for the unlawful and wilful manufacture of whiskey and for aiding, assisting and abetting parties, whose names are unknown to the jurors, in the said manufacture. Verdict of guilty. Appeal by defendants.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

E. L. Gavin for defendant.

CLARK, C. J. Three officers, in consequence of information received, reached the place where a still was in operation about midnight. There were three men at the still; one appeared to be a negro and the others two white men. The officers could not recognize them at the time. The officers destroyed a lot of whiskey and beer and captured the still.

The defendant moved for a nonsuit. The evidence against the defendant was in substance as follows: The defendant lived about a half mile from the still. When the three men at the still discovered the officers they ran in the direction of Officer Groce. He testified that he saw two white men and one negro; two of whom ran towards him; he threw his flashlight on them, which caused the one in the rear to dodge and run back across a ditch and into a pond of water; he saw a track in the ditch where the man had run which appeared to have been made by tennis shoes. After destroying the liquor and capturing the still, the officers met the defendant in the road near his house about 1 a. m. The defendant had on tennis shoes and overalls. The shoes and the bottom of the overalls were wet, and upon arresting him the officers found on his person a quinine bottle of whiskey, which they called a "testing vial." The motion to nonsuit was properly denied.

From all the circumstances the jury were entitled to draw the inference that the defendant was guilty of assisting or aiding in the manufacture of the whiskey which was captured. Certainly the court was not authorized by a motion to nonsuit to adjudge that there was no evidence.

The defendant excepted also that the court ruled out testimony as to how much cotton and corn the defendant had made that year. This testimony was irrelevant, especially as the defendant admitted that he was a farmer.

These exceptions were not properly assigned, for they were not set out in the assignment of error as required by the uniform practice and decisions of this Court, but each assignment of error merely refers to the pages where the excluded evidence and the parts of the charge excepted to can be found, leaving us to grope through the record to find them. This is contrary to the requirements of the rule which the Court has found necessary to prescribe and has often called attention to. *Lee v. Baird,* 146 N. C., 361, and cases cited in the 2 Anno. Ed. It is necessary that for the orderly and prompt dispatch of business the simple requirements of the Court shall be observed by parties who ask that the action of the court below shall be reviewed on appeal and counsel should observe these requirements.

The defendant also assigned error in the same irregular way, without setting forth the paragraph referred to, that the court erred in its charge. Not to be used as a matter of precedent, but we will, however, notice both the charge and the evidence thus insufficiently assigned as error: The court in reciting the testimony of the officers said that "upon approach of the officers they ran, and one of them ran within ten steps or ten feet, I have forgotten which, but you gentlemen will remember testimony of the officer who testified." This is not objectionable as singling out, or giving any particular weight to any testimony.

The defendant also excepted because in reciting the testimony the court stated that "when the defendant was arrested he had on white overalls and they were wet, and that he had on tennis shoes, and they were wet, and that the tennis shoes that he had on corresponded to the tracks made around the still." In this we cannot see how the court could have recited this testimony without stating it.

The defendant also excepted in the same irregular way, without referring to the charge except by citing us to the page, to the following charge: "I instruct you, gentlemen of the jury, as the defendant, his wife and his brother, and his brother's wife have testified in the case, it is your duty to receive their testimony with a degree of caution and to closely and carefully scrutinize it, and scan it because they are interested in your verdict." This was excepted to, but the judge in the same breath, without pausing, proceeded to say, "But if after such scrutiny you are satisfied they are telling the truth, it will then be your duty to give their testimony as much credibility as you would give a disinterested witness. Credibility means worthiness of belief. You, gentlemen, are the judges of the weight and the credibility that you will give each and all of the witnesses; you may believe some of them and not believe others; you may believe a part of what they say and not believe other parts, and of all these things you are the judges." The judge further told the jury that they were judges of what was said by the witnesses and of their acts and their demeanor when they testified and how they conducted themselves on the stand, and to take into consideration and to compare all the evidence, including the evidence tending to show the good character of the defendant. He further fully instructed them as to the doctrine of reasonable doubt, and told the jury that if they were satisfied "from the evidence beyond a reasonable doubt that the defendant engaged in the manufacture of liquor, it would be your duty to convict him of that charge. If you find from the evidence beyond a reasonable doubt that he aided and abetted another or others in the manufacture of intoxicating liquor, it will be your duty to convict him of that charge. You may convict him of one charge and acquit him of the other. You may acquit him of both charges or convict him of both as from the evidence you find the facts to be."

The defendant also assigned as error in the same irregular way, without quoting the words, the statement by the judge of the contentions of the State arising upon the evidence.

The defendant also excepted for refusal to set aside the verdict because against the weight of the evidence, which is not reviewable.

The defendant also presented on the argument of the appeal an exception to the charge, though not made in the record or assigned as error, that the court did not charge the jury that by a local law the officers were entitled to a reward of $50 each for an arrest in a case of this kind. It does not appear that the court did not make such charge, and the defendant cannot be heard on assignment of error which he did not make even if it had appeared that the judge did not so charge. The local act was not called to the attention of the judge, nor was he requested to charge on it, and the credibility of the officers was not impeached by any cross-examination nor by any impeachment of their testimony nor, as in the case of the defendant's relatives, by reason of the fact of their being officers as the relatives were by their relationship.

The defendant further excepted because the jury found the defendant not guilty of manufacturing whiskey, but guilty of aiding and abetting. This being a fact, as we must take the verdict to be, there is no reason why the jury should not so find.

It is true that all who participate in illicit distilling are principals in the manufacture of liquor *(S. v. Killian,* 178 N. C., 753), and whether the defendant was guilty of manufacturing or aiding and abetting in manufacture the jury could return a general verdict of guilty, but C. S., 3409, provides that any one who shall unlawfully "manufacture or aid, assist, or abet others" in so doing shall be guilty of a misdemeanor. The defendants certainly cannot complain if the two offenses are charged in separate counts or that the jury acquitted of actively engaging in alleged manufacturing, but convicted of aiding and abetting others in doing so.

Upon the whole case, giving the defendant every reasonable and possible exception, we find

No error.

STATE v. ROBERT JOHNSON.

(Filed 1 March, 1922.)

1. Procedure—Supreme Court—Rules of Court—Constitutional Law.

The procedure in the Supreme Court is vested by constitutional authority entirely with this Court, without power of the Legislature to modify it.

2. Appeal and Error—Docketing Appeal—Certiorari—Motions—Laches.

Whether the appellant has legal excuse in not docketing his case on appeal in time for it to be regularly heard at the call of the district to which it belongs is a matter for the Supreme Court to determine upon his docketing the record proper and moving for a *certiorari* under the rule.

3. Same—Statutes—Discretion of Court—Case—Extension of Time.

Where the appellant has not docketed the record proper and moved for a *certiorari* under the rules, he may not successfully resist appellee's motion to dismiss for not having his case docketed in the required time by attempting to show that such failure was caused by the trial judge in extending the time for the preparation and service of the case and countercase. *Semble*, an unreasonable time given for such purpose will not be recognized by the Supreme Court.

APPEAL by defendant from *Cranmer, J.*, at August Term, 1921, of CHATHAM.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Wade Barbee and Long & Bell for defendant.

CLARK, C. J. At August Term, 1921, of Chatham, the defendant was convicted of having intoxicating liquor in his possession for the purpose of sale, and also of receiving more than one quart, in one package, at one time, in fifteen days, and appealed. The appeal was not docketed in this Court until 11 February, 1922. The August Term of Chatham was held before the commencement of the Fall Term, 1921, of this Court, but there was no record proper docketed, and the motion of the Attorney-General to dismiss must be allowed.

Rule 5 of this Court requires that "the transcript of the record on appeal from a judgment rendered before the commencement of a term of this Court must be docketed at such term seven days before entering upon a call of the docket of the district to which it belonged and stand for argument in its order." There are exceptions as to the first three districts only. The uniform practice of this Court, under the rules found necessary for the proper dispatch of the public business, requires that when this is not done, if there is any good excuse as for failure of the judge to settle the case on appeal or otherwise, still the record proper must be docketed seven days before the call of the docket of the district at the proper term and an application made to this Court for a *certiorari,* upon which motion, based upon affidavit, the Court will decide whether a *certiorari* will issue or not to supply the defect. The appellant cannot decide this matter for himself.

In this case the record proper was not docketed at last term in the time required by the rules, and no motion for *certiorari* was asked for, and the appeal must be dismissed.

The excuse offered by the appellant for not docketing the record proper at last term is that the judge granted 60 days in which the appellant could serve the case on appeal, and the State was allowed 60 days to reply, and that if this time had been occupied, the case could barely have been settled in time to have been heard at last term. But even taking this to be so, that did not dispense with the duty of the appellant to obtain from the clerk below a transcript of the record proper, and on an affidavit showing no neglect on his part, he should have moved for a *certiorari.* It is by no means certain that if the appellant had taken the 60 days to serve the case on appeal that the State would have been as derelict, or as lacking in promptness in serving the counter case.

At any rate the matter should have been presented to this Court by following the recognized rule of docketing the transcript and the record proper and asking for *certiorari.*

The procedure in this Court by the Constitution is left entirely to this Court and no act of the Legislature has sought to, or could, modify the procedure here. *Herndon v. Ins. Co.,* 111 N. C., 384.

It is in the interest of the public and necessary for the proper dispatch of the business of the Court that there should not be unnecessary delay in settling cases on appeal. It would only result in making the settlement of such cases more difficult if there were greater lapse of time, and would increase the difficulty of settling disputes as to what happened at the trial.

Prior to the adoption of the Reformed Procedure in 1868, all cases on appeal were settled by the judges, whose practice was to perform this duty before leaving the court at which the case was tried. It was thought that their duty in this respect might be lightened by changing the statute, so as to permit counsel to agree upon settlement of the case on appeal and to call in the aid of the judge only where counsel failed to agree. The time originally allowed for this purpose was five days for the appellant to serve case on appeal and three days for the appellee to serve a counter case. This was lengthened from time to time until by our statute it is now (C. S., 643) fifteen days to serve case on appeal and ten days to serve counter case, except where the parties by consent extend the time. The result has not been beneficial. There has been an increasing tendency to postpone and put off the settlement of cases on appeal by lengthening the time, and the last Legislature has permitted the judges to extend the time even when counsel do not agree.

But this Court has never changed its rule, of which it is sole judge, that in every case when the case on appeal is not docketed in the time required, at the next term, the appellant must docket the record proper and ask for a *certiorari.* Whenever this is not done the case not docketed until the next succeeding term will be dismissed. *S. v. Telfair,* 139 N. C., 555 (2 Anno. Ed.), and cases there cited; *Buggy Co. v. McLamb,* 182 N. C., 762; *Rogers v. Asheville, ibid.,* 596.

It is true that under this recent statute by which judges can extend the time to serve cases on appeal, in this instance sixty days were allowed on each side, but under the supervisory power over the lower courts which is wisely given to the courts on appeal in this, as in other states, we are compelled to say that exercise of the power to extend time, especially in a small case like this, to sixty days on each side is inadvisable and cannot receive the approval of this Court. The case, in its nature, is very brief and might have been settled certainly within the statutory time. It will be much better if all cases, when possible, especially these small cases, were always settled while the facts are fresh and before the judge leaves the court. Certainly in a matter of this kind, the enormous time allowed of sixty days on each side is without justification.

But however that may be, the Rules of the Court, which are committed by the Constitution, entirely to this Court to formulate and control *(Horton v. Green,* 104 N. C., 400), require that if a case for *any reason* is not docketed at the first term after trial below a transcript of the record proper must be docketed in apt time and a *certiorari* asked for. This not having been done, the motion to dismiss is allowed.

NOTE.—In No. 86, *S. v. Spain,* from Chatham, Fall Term, 1921, conviction for intoxicating liquor and aiding and abetting same; and No. 87, *S. v. Phillips,* conviction at August Term, 1921, of Chatham, for aiding and abetting in the manufacture of intoxicating liquor, there was the same state of facts—no record proper having been docketed nor application for *certiorari* in apt time at the Fall Term, being first term after the trial below—and the motion of the State to dismiss the appeal must be allowed.

STATE v. W. E. CLARK.

(Filed 1 March, 1922.)

1. **Intoxicating Liquor—Spirituous Liquor—Manufacture—Aiding and Abetting—Criminal Law—Punishment.**

The first conviction of manufacturing or aiding and abetting in the manufacture of spirituous, etc., liquors is a misdemeanor, and the second is a felony, C. S., 3409; and where the indictment does not charge a previous conviction it will be presumed that the defendant has not heretofore been convicted of the offense charged. C. S., 4617.

2. **Intoxicating Liquor—Spirituous Liquor—Aiding and Abetting—Manufacturing.**

The defendant, guilty of aiding and abetting the unlawful manufacture of liquor, is equally guilty with those who actually operated the still.

3. **Intoxicating Liquor—Spirituous Liquor—Manufacturing—Aiding and Abetting—Evidence—Verdict.**

While a verdict in a criminal action cannot rest upon mere suspicion, or conjecture, or speculation, and legal evidence of every material fact necessary to support the indictment, is required, such evidence not held insufficient, as a matter of law, where the substance of the offense is proved, and the evidence on the whole is such as may lead reasonable minds, acting within the limitation prescribed by the rules of law to different conclusions.

4. **Nonsuit.**

Upon this trial the evidence is held sufficient to sustain a conviction.

APPEAL by defendant from *Cranmer, J.,* at October Term, 1921, of CHATHAM.

The defendant and J. W. Mays were indicted for the manufacture of intoxicating liquor, and for aiding and abetting in such manufacture. They were convicted, and after judgment pronounced the defendant Clark appealed.

There was evidence for the State tending to show the following circumstances: Mays had come from Durham and had lived in Chatham for only two or three months. He was staying with J. E. Cole, his son-in-law; and George Martin, a white man who ran from the still when the officers approached it, was staying at the home of the defendant Clark. The dwelling of J. E. Cole and that of Clark were in the same neighborhood. Clark admitted that George Martin had been boarding with him for some time. On 15 June, 1921, the officers found, between one-half and three-quarters of a mile from Clark's house, a complete still plant in operation—copper still, furnace, three stands of beer, and twenty-five or fifty steps away seven bags of corn meal, two of which had shipping tags bearing the name and address of Mays and purporting to have come from Durham. The land on which the still was found was not shown to be that of the defendant, but on his land were several still sites. Near the sacks of meal the officers found a wagon track which led into the public road, and then in the direction of the homes of Mays and Clark. The officers were not able to distinguish this track from other wagon tracks in the public road, but about one-half mile down the public road was a driveway into J. E. Cole's yard, and about three hundred yards further there was another road "leading off through the yard of the defendant Clark." There was one wagon track here leading to a wagon near Clark's barn. In the bed of the wagon there were evidences of meal. One of the officers testified that he noticed a fresh wagon track leading from the distillery into the yard of the defendant Clark, and that he followed the track to where there was standing in it a one-horse wagon, in the bed of which meal was scattered. A newspaper was found at the distillery having on it the name and address of the defendant Clark.

There was evidence for the defendant in contradiction, but it need not be stated in detail, because the only question which the appeal presents is the sufficiency of the State's evidence.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Wade Barber and Long & Bell for the defendant.

ADAMS, J. "It is unlawful to manufacture or to aid and abet in the manufacture of spirituous or malt liquors or intoxicating bitters." C. S., 3409. Any person committing a breach of this statute shall for the first conviction be guilty of a misdemeanor, and for the second or any subsequent conviction shall be guilty of a felony. *Ibid.* The indictment does not charge a previous conviction of the defendant, and it is therefore presumed that he has not heretofore been convicted of this offense. C. S., 4617; *S. v. Dunlap*, 159 N. C., 492. The defendant, then, is prosecuted for a misdemeanor, and even if he merely aided and abetted in the manufacture of the liquor he is equally guilty with the person who actually operated the still. The only question involved in the appeal is whether the evidence, construed in the light more favorable to the State, is sufficient to sustain the conviction. A verdict cannot rest upon mere suspicion, or conjecture, or speculation; there must be legal evidence of every material fact which is necessary to support the indictment. It is sufficient, however, if the substance of the offense is proved, and if the evidence on the whole agrees with and supports the hypothesis which it is adduced to prove. 23 C. J., 52. In *S. v. Prince*, 182 N. C., 788, on which the defendant relies, it is said: "The province of the jury should not be invaded in any case, and when reasonable minds, acting within the limitations prescribed by the rules of law, might reach different conclusions, the evidence must be submitted to the jury. *Campbell v. Everhart,* 139 N. C., 516, 52 S. E., 201; *Lewis v. Steamship Co.,* 132 N. C., 904, 44 S. E., 666; *Wheeler v. Schroeder,* 4 R. I., 383; *Offutt v. Col. Exposition,* 175 Ill., 472, 51 N. E., 651; *Day v. Railroad,* 96 Me., 207, 52 At., 771, 90 Am. St. Rep., 335; *Catlett v. Railway,* 57 Ark., 461, 21 S. W., 1062, 38 Am. St. Rep., 254; *Railroad v. Stebbing,* 62 Md., 504." Applying these principles to the evidence, we think his Honor properly submitted to the jury the question of the defendant's guilt. Certainly, upon the State's evidence reasonable minds might reach different conclusions. There is no error, and this will be certified to the Superior Court of Chatham County.

No error.

STATE v. WILL ALSTON.

(Filed 1 March, 1922.)

1. **Intoxicating Liquor—Spirituous Liquor—Indictment—Several Counts —Instruction—Burden of Proof.**

Where the defendant is on trial under two counts of an indictment, one for having whiskey in his possession for the purpose of sale, and the other that he had received more than one quart of it within fifteen consecutive days, evidence that he denied ownership of the whiskey, more than two quarts and less than one gallon, which was hidden in his barn, and found by the officer only after a careful search, with the other evidence of empty jugs in his home smelling of whiskey, *is held* sufficient to sustain a general verdict of guilty upon the open question of fact as to defendant's guilt, under a charge that the State was required to satisfy the jury thereof beyond a reasonable doubt.

2. **Same—General Verdict.**

Where the defendant is tried for the violation of the prohibition law under several counts in the indictment, a general verdict of guilty will be sustained, if the conviction was valid as to any one of them.

3. **Intoxicating Liquor—Spirituous Liquor—Receipt of More Than One Quart—Evidence—Questions for Jury—Trials.**

Where a jug containing two quarts of whiskey was found by the officer making the arrest carefully hidden in the defendant's barn, the jury may infer, and find for their verdict, that he had received at one time more than one quart of intoxicating liquor, within the time prohibited by the statute.

4. **Same—Instructions—Possession—Presumptions—Appeal and Error.**

Where there is evidence on the trial tending to show that the defendant had carefully concealed in his barn more than two quarts of whiskey, the

> ownership of which he denied, and an empty jug smelling of whiskey was found in his hands in his dwelling by the officer making the arrest, a charge of the court that places the burden of showing guilt of the defendant beyond a reasonable doubt upon the State, and emphasizes the position of the defendant that there is no presumption thereof from the possession of less than one gallon, but leaves it an open question for the jury, is not error.

APPEAL by defendant from *Cranmer, J.*, at October Term, 1921, of CHATHAM.

The defendant was indicted under the statute in two separate counts, in that he had whiskey in his possession for the purpose of sale; and that he received more than a quart of it within fifteen consecutive days.

John Burns testified for the State that he was a special deputy in Chatham County, and on 18 March, 1921, he went to the home of the defendant and searched his house and his barn. He searched the house first and found one one-half gallon jug empty, which had had whiskey in it; then seached the barn and found a jug that had some whiskey in it. He arrested the defendant and carried him to the defendant's father's home and delivered him to Sheriff Blair. He went back to the defendant's barn, made another search and found a one-half gallon jug full of whiskey; that he took this whiskey and carried it to Pittsboro with the defendant; that the witness asked the defendant to whom the whiskey belonged, and he said that it did not belong to him. The total amount of whiskey seized was less than one gallon. When the officer found the first jug the defendant was in his barn and had the jug in his hands, in the act of sitting it down, when the witness walked in the barn door. The whiskey was measured at the preliminary hearing and less than one gallon was found.

The State rested, and defendant moved for judgment as of nonsuit. Motion overruled.

Defendant was convicted by a general verdict of guilty, and appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Long & Bell and Wade Barker for defendant.

WALKER, J. The defendant requested that several instructions submitted by him be given to the jury: First, that there was no evidence that he had the whiskey in his possession for the purpose of sale; and, second, that there is no presumption of that fact, and that the law presumes that the defendant acquired possession of the whiskey lawfully; and, third, that the possession by him of more than one quart of whiskey was not *prima facie* evidence that he had received more than one quart during any fifteen consecutive days, nor is there any presumption raised that he received more than one quart oftener than fifteen consecutive days, nor that he received more than one quart at any one time.

The court in responding to these prayers stated distinctly to the jury, and in language which could not have been misunderstood by them, that no *prima facie,* or presumptive, case had been made against the defendant, but submitted the evidence to the jury, under proper instructions, as to the law, to find as an open question of fact whether the defendant was guilty. The charge was entirely fair to the defendant, and even more favorable to him than was necessary, or required by the law that it should be. The defendant was indicted in more than one count, and if the conviction was valid as to any one of the counts this is sufficient in law to sustain the judgment. It was so held in *S. v. Coleman,* 178 N. C., 757, where the indictment charged:

(1) Possession of liquor with the purpose of sale.
(2) Receipt of more than one quart at a time.
(3) Receipt of more than one quart at a time in a single package.
(4) Transportation of the liquor.

The Court, by *Justice Allen,* there held: "The third exception is to the failure to fully explain the law to the jury, but there was no legal principle involved beyond the doctrine of reasonable doubt, which was correctly stated, except as bearing on the first count, upon which the defendant was acquitted, and the fourth. On the second and third counts the controversy was one of fact as to whether the liquor was received by the defendant or Scott. We do not approve the charge on the fourth count. This does not, however, entitle the defendant to a new trial, because there are two good counts as to which there is no error, and it is well settled in this State that where there is more than one count in the indictment, and there is a general verdict, this is a verdict of guilty on each count, and if there is an error as to one or more counts by reason of any defect therein, or an erroneous charge as to said count, or lack of evidence, the verdict will be imputed to the sound count in the indictment, as to which there was no erroneous instruction, and upon which evidence is offered," citing *S. v. Toole,* 106 N. C., 736, where, as said by *Justice Allen,* "The authorities to that effect, which are numerous, are collected." See, also, *S. v. Holder,* 133 N. C., 711.

There certainly was some evidence here that the defendant had received the liquor, or a part of it, consisting of more than one quart, at the same time, in one container, or package. He was found with one jug containing two quarts, which he could not well have had in his possession unless he had received it somewhere or from somebody. There was nothing but a simple question of fact upon the testimony, which was brief, whether the defendant had received more than one quart within the period of time fixed by the statute. The court gave the defendant the full benefit of the presumption of innocence, and the doctrine of reasonable doubt, and no fault can be found with the charge in this respect, and in all other particulars it complied fully with the principles stated in *S. v. Barrett,* 138 N. C., 630; *S. v. Wilkerson,* 164 N. C., 437; *S. v. Helms,* 181 N. C., 566. The presiding judge clearly and emphatically charged the jury that there was no *prima facie* case of guilt, in respect to any of the crimes charged in the indictment, and that they must not consider the case in any such way, but decide upon the evidence alone and beyond a reasonable doubt as to the guilt of the defendant. The secrecy with which the liquor was kept and the concealment of at least a part of it, that is the two quarts, and the denial of its ownership, must have impressed the jury with the belief that the defendant was not engaged in a lawful traffic or pursuit, but was violating the statute, and we are unable to say that this inference was not reasonable and warranted.

There is no similarity between *S. v. Helms,* 181 N. C., 566, and this case, as here Judge Cranmer expressly cautioned the jury that no *prima facie* case, in any respect, had been made by the State.

The motion for a nonsuit was properly overruled.

After a careful examination of the case, and the record, no error has been found therein.

No error.

STATE v. LAURA SINGLETON.

(Filed 15 March, 1922.)

Instructions — Verdict Directing — Criminal Law—Appeal and Error—Prejudicial Error.

Except in instances of admissions or evidence requiring explanation or reply of defendant, the burden of showing guilt beyond a reasonable doubt is upon the State, and it is reversible error for the judge to instruct the jury, against the presumption of defendant's innocence, that should they "believe the evidence," though all for the State, to find the defendant guilty of the offense charged. The language of the charge is again disapproved.

APPEAL by defendant from *Cranmer, J.,* at November Term, 1921, of WAYNE.

Criminal prosecution, tried upon an indictment charging the defendant with having willfully and unlawfully rented rooms in her house for purposes of prostitution in violation of Public Laws 1919, ch. 215.

The State offered three witnesses, policemen of the city of Goldsboro, who testified in effect that they had seen men going in and out of defendant's house; that her reputation was bad, and that one Mira Brown had been heard to swear, in the presence of the defendant, that she occupied one of her rooms for immoral purposes. The officers witnessed no acts of immorality.

The defendant offered no evidence.

There was a verdict and judgment against the defendant, from which she appealed, assigning errors.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

J. F. Thompson for defendant.

STACY, J. At the close of the evidence his Honor charged the jury as follows: "Gentlemen of the jury, you have heard the evidence of the witnesses. If you believe the evidence, I instruct you that you will find the defendant Laura Singleton guilty." To this instruction the defendant excepted, and the same is assigned as error. We think the exception is well taken, and under a uniform line of decisions it must be held for reversible error. *S. v. Alley,* 180 N. C., 663; *S. v. Boyd,* 175 N. C., 793; *Brooks v. Mill Co.,* 182 N. C., 260, and cases there cited.

The defendant entered on the trial with the common-law presumption of innocence in her favor. Her plea of not guilty cast upon the State the burden of establishing her guilt, not merely to the satisfaction of the jury, but beyond a reasonable doubt. The evidence here was not compelling. The jury might have believed it and yet acquitted the defendant. Furthermore, it is error for the trial judge to direct a verdict in a criminal action, where there is no admission or presumption, calling for explanation or reply on the part of the defendant. *S. v. Hill,* 141 N. C., 769; *S. v. Riley,* 113 N. C., 651. See, also, *S. v. Falkner,* 182 N. C., 793.

We feel sure that the language employed was only an inadvertence on the part of the learned judge who tried the case; but again we are constrained to call attention to the fact that the form of expression, "If you believe the evidence," should be eschewed in charging the juries in both criminal and civil actions. *Merrell v. Dudley,* 139 N. C., 58.

New trial.

STATE v. NICK SALEEBY.

(Filed 15 March, 1922.)

1. **Criminal Law—Intoxicating Liquor—Spirituous Liquor—Misdemeanor—Grand Jury—True Bill—Courts—Jurisdiction.**

Where a recorder's court is given jurisdiction in trials for the possession and unlawful sale of intoxicating liquor, with authority to transfer the same to the Superior Court upon defendant's desiring a jury trial, it is unnecessary, when such is done, that a true bill will be found in the latter court, the lower court having jurisdiction of the misdemeanor.

2. **Criminal Law—Intoxicating Liquor—Spirituous Liquor—Indictment—Evidence—Trials.**

Exception that there was no evidence that the defendant unlawfully sold intoxicating liquor to the person named in the indictment, is untenable, when after the defendant has introduced evidence at the trial, the State has, in rebuttal, introduced evidence that the defendant had sold such liquor to the person, as charged in the indictment.

3. **Same—Surplusage.**

It is not necessary, for conviction, that an indictment for the possession and unlawful sale of intoxicating liquor charge the sale was made to a specified person, and where the indictment does so charge, it is surplusage.

4. **Appeal and Error—Instructions—Corrections—Objections and Exceptions.**

The Supreme Court may allow a correction in the case on appeal to make the record speak the truth when it is sufficiently made to appear that the trial judge will do so if afforded an opportunity, and thus render ineffectual an error assigned thereto, when the correction has been thus made.

5. **Criminal Law—General Verdict—Appeal and Error—New Trial.**

Upon a general verdict on two counts of an indictment, error as to one of them alone will not entitle the defendant to a new trial on appeal.

6. **Courts—Instructions—Argument of Counsel—Prejudicial Argument—Evidence—Appeal and Error—Error Effaced.**

Where the solicitor has gone beyond the evidence in his speech to the jury, to the prejudice of the defendant in a criminal action, and it appears that the trial judge had stopped him and required him to withdraw his statement in the presence of the jury, and instructed the jury that there was no evidence thereof, and not to consider it, the effect of the prejudicial remarks of the solicitor will be held on appeal as effaced, and a new trial will not be ordered.

7. **Evidence—Character—Reputation—Voluntary Restriction by Witness.**

Where the defendant, being tried for violating our prohibition statutes, takes the stand, he puts his character in issue; and where a witness, in response to the solicitor's question, states that it is bad, and then voluntarily qualifies his answer by adding, "for selling liquor," the admission in evidence of this qualification is not erroneous.

APPEAL by defendant from *Horton, J.,* at August criminal term of PITT.

The defendant was arrested on a warrant issued from the mayor's court of Greenville, charging (1) possession of liquor for sale; and (2) charging the sale thereof to one Guy Caton; and was bound over to the recorder's court. Under Public-Local Laws 1915, ch. 681, sec. 3, establishing an inferior court for Pitt, the judge was given power to transfer any cause therein pending to the Superior Court, and the defendant desiring a jury trial, the case was transferred to the Superior Court. And from the general verdict of guilty, and sentence, the defendant appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Albion Dunn for defendant.

CLARK, C. J. The defendant was convicted upon both counts on a general verdict. There was evidence of the sale of liquor by the defendant to the three State's witnesses, and also that the defendant was a source from whom the bell-boys of the Proctor Hotel had obtained whiskey for the past two years for guests at that hotel.

The defendant's first assignment of error was that there was no bill of indictment by the grand jury. It was not necessary that a bill of indictment should have been found against the defendant in the Superior Court, as the lower court had jurisdiction of this misdemeanor. *S. v. Lytle,* 138 N. C., 738; *S. v. Boyd,* 175 N. C., 791, and *S. v. Publishing Co.,* 179 N. C., 720. The defendant moved for a nonsuit at the close of the State's evidence, because there was no evidence at that time of the sale to Guy Caton, but that was obviated by the fact that the defendant put on evidence, and the State in its reply proved, a sale to Guy Caton. *S. v. Ingram,* 180 N. C., 673. Besides, C. S., 3383, provides: "It shall not be necessary to allege a sale to a particular person." *S. v. Brown,* 170 N. C., 714, and the allegation in the warrant of the sale to Caton, even if it had not been proven, would have been mere surplusage. *S. v. Lemons,* 182 N. C., 829.

The case on appeal contained an assignment of error in the charge, but the Attorney-General moved the court for leave to correct the statement of the case in that particular, alleging an inadvertence in making up the case on appeal, and the willingness of Horton, J., if given an opportunity, to correct the mistake. This Court has repeatedly held that it will not correct a statement of a case on appeal unless the party moving for such corrections makes it clear to the Court, usually by letter from the judge, that he will make the correction if given the opportunity. *Slocumb v. Construction Co.,* 142 N. C., 351, and cases there cited. On motion by the Attorney-General, and notice thereof to counsel for the defendant, the case on appeal was amended by the judge, upon being given the opportunity to do so.

There being a general verdict upon two counts, if there is no error as to one the verdict and judgment will stand. We, however, find no error as to the second count, also. In the course of the argument the solicitor stated to the jury that "they could not afford not to convict the defendant for the reason that he had sold so much liquor in town that an indignation meeting had been held in front of the National Bank about this matter." In apt time, and immediately upon this statement, the counsel for the defendant arose and objected to the remark, for the reason that there was no evidence to support the statement, and the same was highly prejudicial to the defendant. His Honor stopped the solicitor in his argument and required him to withdraw his statement, which he did then and there, in the presence of the jury, and the judge charged the jury not to consider the same, as there was no evidence to support it, and not to consider it.

The remark of the solicitor was improper, and the court did all that could be done to correct any injurious impression that the jury might have received therefrom. It would be exceedingly detrimental to the administration of justice if a remark of counsel during the progress of the trial, or even an inadvertent expression of the judge should be construed as so injurious that the proceedings are hopelessly invalid. When the judge has plainly stated to the jury that the remarks were improper and carefully cautioned them that the remarks should be not considered, all has been done that is reasonably necessary to obviate the effect.

In *S. v. Jacobs*, 106 N. C., 696, where there was an exception that an incidental remark of the judge invalidated the proceedings, this Court said: "Our juries are usually men of intelligence, competent to understand the evidence and draw their own conclusions as to the facts. To construe every remark incidentally made by the judge in ruling upon debated questions arising on the trial, or otherwise, to have such weight upon the mind of the jury as to bias the freedom of their verdict is as little complimentary to the intelligence and sturdy independence of those who compose our juries as it is to the impartiality of those who are called upon to preside over our Superior and criminal courts." This was cited and approved in *S. v. Baldwin*, 178 N. C., 690, and in other cases there cited. In *S. v. Crane*, 110 N. C., 535, the Court, in commenting upon the exception that though the judge had withdrawn the evidence from the jury, they would still be affected by it, said: "Jurors are not supposed to possess legal training; their province is not to pass upon considerations of law, but their grasp of the facts is usually just and accurate, and probably no term of court passes that upon the jury there are not men of equal mental capacity with the judge who presides or the counsel who address them. Jurors are not in their nonage, and it is not just to underrate their intelligence."

The defendant, having gone on the witness stand, put his character in issue. A witness testified that the defendant's character was bad, voluntarily qualifying it by adding, "for selling liquor." This was not erroneous. *S. v. Butler,* 177 N. C., 585. Besides, that fact fully appeared in the evidence on the facts.

It appears from the evidence that the defendant was proven not only to be guilty, but was shown to be a hardened offender against the law in this particular. Upon consideration of all the exceptions, we find

No error.

STATE v. HUGH FREEMAN.

(Filed 22 March, 1922.)

Criminal Law—Larceny—Evidence—Appeal and Error—Irrelevant Evidence—Prejudicial Error.

The circumstantial evidence on the trial in this case for larceny of tobacco, tending to show that the prosecutor's tobacco had been stolen and brought to market by the defendant and sold on the warehouse floor; that he was without money on the day preceding the sale, and had it the day following, *is held* sufficient to sustain a verdict of conviction, but a new trial is awarded on appeal upon the unexplained introduction of a canceled check made payable to another named person, or bearer, without evidence that it had ever been in defendant's possession or connecting him with it; as such, though technically irrelevant, must have prejudiced the defendant to the jury when taken with other evidence relating to his lack of money the day before, and his having it the day after the tobacco sale.

CLARK, C. J., dissenting.

APPEAL by defendant from *Devin, J.,* at January Term, 1922, of FRANKLIN.

The defendant was indicted for the larceny of 238 pounds of leaf tobacco, the property of E. R. Grissom. There was a count for receiving the tobacco knowing it to have been stolen. The following is the material part of the State's testimony:

F. G. Avent testified that he was in Raleigh on 3 November, 1921, at the Union Warehouse. Had carried a load of tobacco there for sale; that he got there the night before; that he lived at his father-in-law's, John Allen, in the "Hurricane," that he, John Allen, and Jesse Jackson drove in a wagon by Grissom's home and went to Raleigh by the Fall's of Neuse road. That this was not the nearest road to Raleigh; that some one asked him to help him pack a pile of tobacco in baskets in a warehouse, and that he helped a man to straighten out a pile of tobacco; that it was placed in baskets in four grades; some of it was lugs or sorry tobacco. The man told him he might have the sticks, as he was not going to plant any the next season. He lived in Warren County, and doesn't know who the man was, but he thinks it was the defendant; that defendant and his uncle, Mr. Allen, came to his house and asked him if he could recognize the defendant as the man who got him to help him pack the tobacco in Raleigh. He told them he thought he could.

E. A. Grissom testified that he lived on Ike Winston's land, and cultivated a crop of tobacco, and had a lot of 238 pounds ready for market on the night of 2 November. Somebody entered his pack house and carried it off; that there were three tracks that led from the pack house to the woods, where a horse had trampled the ground; that he traced the tobacco by scraps until within 30 feet of the woods; that he went to Raleigh on Friday and found one pile of his tobacco and recognized it, but did not claim it. That he also recognized the sticks, six of them he found at Avent's. Young testified that he was in a garage on Friday evening when defendant came in and paid a small bill, about $3.25, and said he didn't mind paying garage bills if he could make money as easy as he made that last night. Defendant had other money besides that he paid the bill with.

W. C. Young testified that he saw defendant in Raleigh on Friday at the tobacco warehouse about 12 o'clock.

John Young testified that he saw a man asleep early in the morning, 3 November, in a pile of tobacco, whom he took for defendant.

Latta Harris testified that he ran a garage at Youngsville, and on Thursday evening, 3 November, he repaired an auto for defendant, and he pawned his pistol as security, and Friday evening he did more work for him and he paid him all, about $7, Friday evening.

Jesse Jackson testified that he went in a wagon with Avent and Allen to Raleigh Thursday night; that they passed the woods near Grissom's and went the Fall's road to Raleigh.

A. D. Dickerson testified that E. A. Grissom, the prosecutor, married his daughter. That about seven hours after Grissom missed his tobacco, the witness went down to the woods where the tracks led from the pack house, and in the woods he found a brown piece of paper on which was written in pencil the words, "Hue Freeman and Miss Ever Hackody, Creekmore, 1921"—to the introduction of this paper defendant objected; objection overruled, and defendant excepted; exception No. 1.

"The State introduced a canceled check for $123, payable to H. B. Allen or bearer, with no endorsement on the back. To the introduction of this paper-writing defendant objected; objection overruled, and defendant excepted"; exception No. 2.

Defendant demurred to the evidence, and himself offered no evidence. There was a verdict of guilty. Defendant moved to set aside the verdict as being against the weight and contrary to the evidence; motion denied, and defendant excepted.

Assignments of error:

1. To the introduction of the paper-writing with the names "Hue Freeman" and "Miss Ever Hackody, Creekmore, 1921," on it, because there was nothing connecting defendant with said paper-writing, no proof that it is in the defendant's handwriting, or that it was ever in defendant's possession.

2. To the introduction of canceled check payable to H. B. Allen or bearer, because there was no evidence to connect defendant with it; or that he ever owned it or received the proceeds of it.

3. The failure of the court to set aside the verdict because the evidence was not sufficient to convict the defendant.

The jury convicted the defendant, and from the judgment he appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

N. Y. Gulley, B. F. Holden, and W. M. Person for defendant.

WALKER, J. There is one exception by the defendant which we think is well taken. The State introduced in evidence a canceled check for $123, payable to H. B. Allen or bearer, which was not endorsed. The defendant's objection to this paper as evidence was overruled, and he duly excepted. We are unable to conceive in what way, or for what purpose, this evidence was competent or relevant. There is nothing on the check showing that it had any connection with the case. It was not drawn by the defendant, so far as appears, and his name is not on it. Why it was allowed to be considered by the jury we were not informed. It was wholly irrelevant to the controversy. But it was contended by the State that if it was wholly irrelevant, the effect would be, in law, that it was harmless and not, therefore, ground for reversal. But we are not sure of this conclusion. Having been admitted by the court, over the defendant's objection, it was capable of being used by the State as some evidence of the defendant's guilt, in connection with the other evidence, and was no doubt so used. It was argued before us that it was so used, and very effectively. This is not in the record, but we are at liberty to infer that as the court held it to be relevant and competent evidence of guilt, the State made use of it as such to further a conviction. It does not appear to us that it was harmless or did not prejudice the defendant. While there is nothing to connect the defendant with the drawing of the check, or the possession of it at any time, it was no doubt used for the purpose of showing that as he had money on Thursday, when he had none on the day before, he must have received the money, in some way, by means of the check, but this is not a warrantable inference. There is no evidence that the check was found in defendant's possession and taken from him. There is nothing more in the proof than the bare check itself, without the least explanatory evidence, and it should have been excluded by the court as prejudicial to the defendant. It cannot be said that irrelevant evidence, though generally so, is always harmless. We have held otherwise. *S. v. Jones,* 93 N. C., 611; *S. v. Mikle,* 81 N. C., 552. It may sometimes, even though rarely, be very prejudicial to the party against whom it is admitted, as it was held to be in *S. v. Jones, supra.* Considering the nature of the other evidence in this case, that relating to the check, though technically irrelevant, might have been used to account for defendant's having money at one time when the night before he was impecunious, and we have no doubt it was so used by the State and considered by the jury.

There was evidence upon which the jury could have convicted the defendant apart from the check, but they should have been confined to the competent and relevant proof in considering the case. He was the man who was seen at the tobacco warehouse the day after the theft was committed, and was recognized as the man who had the tobacco there, and asked the witness F. G. Avent to help him to straighten it out and pack it, and gave him the sticks as he was not going to plant tobacco the next season. The evidence was sufficient to identify the defendant as the one who had the tobacco at the warehouse. *S. v. Carmon.* 145 N. C., 481; *S. v. Lytle,* 117 N. C., 803; *S. v. Costner,* 127 N. C., 566; *S. v. Lane,* 166 N. C., 333. But the evidence as to identity is stronger here than it was in those cases. There was evidence as to the identity of the tobacco found in the warehouse with that which was stolen.

While we hold that there was some evidence for the jury to consider, upon the question of defendant's guilt, that in regard to the check was incompetent, and should not have been admitted, and was sufficiently prejudicial to entitle the defendant to another trial.

The other exceptions may not be again presented.

New trial.

CLARK, C. J., dissenting: I concur in the statement in the opinion of the Court that "there was evidence upon which the jury could have convicted the defendant apart from the check." This also clearly appears upon the summing up of the evidence as set out by *Mr. Justice Walker.*

The evidence in regard to the check may have had slight probative force, and the jury may have thought that it would add none. But the evidence was not incompetent, but merely irrelevant. It could have had no prejudicial effect.

The defendant was not entitled to a new trial for the mere admission of irrelevant testimony. The admission of merely irrelevant testimony cannot be held for error unless it is shown to be prejudicial, *Ruffin, C. J.*, in *S. v. Arnold,* 35 N. C., 189, often cited since; *Bynum, J.*, in *S. v. Gailor,* 71 N. C., 92; *Smith, C. J.*, in *Comrs. v. Lash,* 89 N. C., 165; in *Gaylord v. Respass,* 92 N. C., 557, and in *Jones v. Call,* 93 N. C., 179; *Deming v. Gainey,* 95 N. C., 532, and there are numerous other cases to this well settled principle.

It cannot be shown that this evidence was prejudicial, for if it does not tend to show the guilt of the defendant, it proves nothing and is harmless. It is not enough that the defendant should assert that the evidence, if irrelevant, was hurtful, but that must be pointed out, and this has not been done.

STATE v. CLYDE P. MONTGOMERY.

(Filed 29 March, 1922.)

1. **Appeal and Error—Objections and Exceptions—Brief.**

   Exceptions not insisted upon in the appellant's brief are deemed abandoned in the Supreme Court under the rule.

2. **Criminal Law—Rape—Evidence.**

   Where the 8-year-old sister of the prosecuting witness in an action for rape has testified that she witnessed the act, it is competent for her to testify that she was then "too scared" to call out and alarm the neighborhood, as an explanation of her failure to give the alarm, its weight to be determined by the jury.

3. **Same—Involuntary Exclamations—Physical Suffering—Corroborative Evidence.**

   Where the prosecuting witness has testified, in an action for rape, as to her physical suffering afterwards, as the result of the defendant's act, it is not error to admit the testimony of the mother that the prosecutrix soon afterwards complained of physical and nervous suffering, when the trial judge confined this evidence to the purpose of corroboration in his instructions; further, such involuntary expressions, under the circumstances, are admissible as substantive evidence.

4. **Appeal and Error—Objections and Exceptions—Instructions—Contentions.**

Exceptions to the statement by the trial judge of the contentions of the parties, in his charge to the jury, taken for the first time in the case on appeal, does not afford the judge trying the case an opportunity to correct error therein, if any committed, and will not be considered.

5. **Criminal Law—Rape—Evidence—Corroboration—Instructions—"Persuade"—Words and Phrases.**

Where the defendant, tried for rape, has taken the stand in his own behalf, and introduced witnesses to corroborate his statements by what he has told them after the act charged, and the judge, in his charge, has limited this testimony for the purpose of corroboration, it is not error for him to say that, the evidence being admitted for that purpose, it was for the jury to say how far it would "persuade" them to believe the defendant's testimony on the subject, the word "persuade" being also defined as "cause them to believe."

6. **Criminal Law — Rape — Instructions—Appeal and Error—Harmless Error.**

Where, in an action for rape, the trial judge has charged the jury that the witness, having taken the stand, may prove his good character as substantive evidence to be considered by them as tending, along with the other evidence, to show his innocence, his further charge that the defendant's good character "would cut no figure" if the jury found upon the evidence, after considering his good character and giving him the full benefit of it, that he was guilty beyond a reasonable doubt, is not reversible error, when it appears from the charge, considered as a whole, that the defendant received the full benefit of all evidence of this kind.

7. **Jurors—Qualification—Courts—Findings of Fact—Appeal and Error—Rape.**

Where defendant, tried for rape, excepted to the refusal of the judge to set aside the verdict of guilty because one of the jurors had expressed an opinion of the defendant's guilt, the finding of the trial judge as a fact that he had taken part in arguments, in his presence, on the subject of capital punishment, but had not expressed or formed any opinion as to defendant's guilt, but had only said that if the defendant were guilty he should be hung; and that the juror was qualified to hear the evidence and reach his conclusion thereon fairly and impartially, sustains his action on appeal in refusing the defendant's motion.

8. **Same—Court's Discretion.**

Held, on this appeal, the question of the qualification of a jury to sit upon the trial would have been a matter largely resting in the sound discretion of the trial judge, on appellant's motion to set aside the verdict for the juror's former expression of bias against him, had the judge found the facts somewhat differently upon the question of the juror's impartiality.

APPEAL by defendant from *Bond, J.*, at January Term, 1922, of NEW HANOVER.

The defendant was indicted for rape committed upon the person of Ruby Smith, and convicted, and from the judgment upon such conviction appealed to this Court.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

J. C. King, W. F. Jones, and Herbert McClammy for defendant.

WALKER, J. The State's evidence, if believed, was amply sufficient to establish all the essential elements of the crime.

The defendant's counsel, in their brief, do not insist upon their exceptions 1 and 2, and so they have abandoned them, under our rule. But there is no merit in them.

Exception 3 was to testimony by Maude Smith, eight-year-old sister of the prosecuting witness, Ruby Smith, that "she was too scared when she witnessed the act of defendant upon her sister to call out and alarm the neighborhood." The witness was clearly entitled to give this explanation of her failure to give the alarm, its weight to be determined by the jury.

Exception 4 was to admission of testimony by the mother of Ruby Smith, that Ruby, soon after the occurrence, complained of physical and nervous suffering. Ruby Smith, however, had previously been on the stand, and had herself testified to this suffering, and the judge told the jury that they were to consider the evidence from the mother only in so far as it tended to corroborate the statement of the girl made here, and for no other purpose. This ruling was more favorable to the defendant than he was entitled to have it. Involuntary expressions as to existing suffering are admissible in themselves when physical condition is a material question in the investigation. This was made material here by the nature of the offense.

Exceptions 5, 6, 7, 8 were all to similar evidence, which was plainly admissible. The same observation may be made to exception 9.

Exception 13 was to a part of the judge's charge in which he was stating one of the contentions of this defendant. Whether or not he stated this contention correctly, does not appear from the record. If it was stated incorrectly, the defendant's counsel should have called the court's attention at the time to its incorrectness, if they deemed it incorrect. To take such an exception after the charge is delivered, and in the case on appeal, is contrary to the rule, and numerous decisions of the Court.

Exception 14 was to the following part of the charge, especially that in brackets: "In earlier part of the trial, gentlemen, I called your attention to this fact that in order to corroborate a witness the law allows another witness to testify that on prior occasions that he had made the same statement that he made here as a witness on the stand, and it allows the jury to consider it, not as substantive evidence, but as corroborative evidence; that is, for this purpose: [How far does it persuade the jury to believe as true the statement made by the witness on the stand, by reason of the fact that the witness has made the same statement about the same occurrence on other occasions, if the jury find that the witness did make the same statement on prior occasions.] They have a right to consider it in that view, simply as assisting them in seeing how far are they persuaded to accept as true the statements made by the witness on the stand. Now, then, as I have said to you, it is not substantive evidence tending to prove the defendant's guilt, it is to be considered only for the purpose of corroboration, as I have outlined to you."

The criticism of the defendant's counsel is directed to the use of the word "persuade." That criticism, however, if just, would, applied as it was to corroborative statements of the prosecuting witness, Ruby Smith, tend to weaken the force of those statements. That is, the jury must be induced to believe those statements before they can give them any weight. However this may be, the jury could not in any sense have been misled by the use of this term, taking the whole charge together. The average juror is not a philologist. He would not stop to consider the exact meaning of a word when its immediate context interpreted it. Besides, the word "persuade" is also defined as "to cause to believe."

Exception 15 was taken to that portion of the judge's charge included in brackets below, as follows: "Now, the defendant contends, as I said to you just now, that he has brought a large number of witnesses here upon the question of his character. The defendant has a right to prove that his character is good if he can when he is being tried for crime, and our courts have all along said that the possession of good character by a man on trial is substantive evidence to be considered by the jury as tending, along with the other evidence, to show his innocence. [The same law says, however, that notwithstanding the evidence as to the defendant's character, if the jury find beyond a reasonable doubt that the defendant is guilty, then the question of his character 'cuts no figure,' that is, if upon consideration of all the evidence in the case the jury say that the guilt of the defendant is proven beyond a reasonable doubt, then the question of his character no longer cuts any figure.] Because it is just as much a crime for a man of good character to violate the law as it is for a man of bad character to violate the law."

It appears that this criticism is also directed to the particular language of the judge. The use of the words "cuts no figure" may have been, as argued, unfortunate, but used as they were, and in the connection in which they were, the jury could not have misunderstood them. Almost immediately the judge returned to this subject, and said: "The prisoner contends that he has come here and admitted the occurrence all along about the selling of the greens, and things of that sort, until he got to this house, and he says he has a consistently good character, which ought to persuade you that his statement should be accepted as true; that he has brought a large number of witnesses, whom you have heard upon the stand testify as to his character, and that putting all these things together you ought to say that you did have a reasonable doubt as to whether he did anything wrong while in the house or not."

He thus draws the attention of the jury to the very point where evidence of good character would most help or benefit the defendant. Qualified as the words criticised were by their immediate context, "If the jury find beyond a reasonable doubt that the defendant is guilty," then he would be guilty regardless of the evidence as to his character, because it is just as much a crime for a man of good character to violate the law as it is for a man of bad character to violate it, they could bear no meaning to the jury prejudicial to the defendant. His Honor was stating, in his characteristic way, a universal truth, known as well to the jury as to himself.

Exception 16 was addressed to the judge's statement of a contention of the defendant, and the remarks heretofore made under exception 13 are applicable here.

Exception 17 was to the statement of a contention of the State, a perfectly legitimate contention under the circumstances, and so far as the record shows not an inaccurate statement.

Exception 18 was taken to the refusal of the judge to set aside the verdict because of the expression of an opinion by one of the jurors, Ira Scott, before the trial, that the defendant was guilty and should be electrocuted. The judge, however, considered the affidavits sustaining and contradicting this allegation, and found the following facts: "That at various times in the place of business of Ira Scott, who served on the jury, there were allusions made by various and sundry people to the Montgomery case, and there were at times debates or colloquies between various people in said place of business upon the rightfulness or wrongfulness of capital punishment. That at different times the juror, Ira Scott, made some statements in the conversations, but that all that he said was not to express any opinion as to whether or not the defendant Montgomery was or was not guilty, but to give it as his opinion that if it was shown that he was guilty of the crime of rape that he ought to be sent to the electric chair, and that he did no more in these conversations than to argue in favor of the correctness of his own belief in the rightfulness of capital punishment. The court further finds that the juror, when he was examined by both sides, stated that he had not formed or expressed any opinion as to the guilt of the defendant, and the court further finds such statement to be a fact. The court finds that he stated that he knew of nothing which would prevent his sitting on the jury and giving the prisoner and the State a fair and impartial trial of the cause, and that he went into the jury box unswayed by any impressions and formed no opinion as to the guilt or innocence of the defendant until after he had heard the evidence in the case and the judge's charge and the jury had retired to consider the case."

"In the trial of this case, when the jury was being selected, the court announced that it would regard it a proper ground of challenge as to any particular juror if he stated that he had formed and expressed an opinion either way; that is, that if any juror said that he had formed and expressed the opinion that the prisoner was guilty the defendant's counsel would be allowed to challenge him, but on the other hand, if any juror said that he had formed and expressed the opinion that the prisoner was not guilty the State would be allowed to stand him aside. The court announced that it would pursue that rule unless it led to embarrassment which would cause it to notify both sides that the rule would be rescinded, and that thereafter the court would follow the decisions of the Supreme Court, based upon the statement of the juror, that notwithstanding the opinion formed he could make a fair and impartial juror."

"The court further finds that at the time the juror Scott was examined by the defendant's counsel they had not exhausted their peremptory challenges, and that before the juror took his seat in the box both the State and the defendant were told by the juror, when being questioned, to what extent he participated in the discussions as set out in the affidavit of said juror, and it further finds that the other statements in the affidavit of said Scott, in addition to those already found, are true. Upon the situation, as it was, the defendant did not challenge, or offer to challenge, the said juror. When examined by defendant's counsel, said juror Scott stated he had not formed or expressed the opinion that the prisoner was guilty; that he had not made any such statement; that he had done no more in the conversations alleged to be the foundation for the motion than to argue in favor of capital punishment."

He further finds: "The juror, when he was examined by counsel, stated that he had not formed or expressed any opinion as to the guilt of the defendant, and the court further finds such statement to be a fact. The court further finds that he stated, when called as juror, and on his *voir dire*, that he knew of nothing which would prevent his sitting on the jury and giving the prisoner, and the State, a fair and impartial trial of the cause, and that he went into the jury box uninfluenced by any impressions, and that he formed no opinion as to the guilt or innocence of the defendant, until after he had heard the evidence in the case and the judge's charge, and the jury had retired to consider the case."

The two principal exceptions in this case are those relating to the proof of the prisoner's character and the one as to the conduct of the juror Ira Scott. As to the reference in the charge to the prisoner's character, and the manner in which it should be considered by the jury, we are clearly of the opinion that the meaning of the judge was so manifest that no intelligent juror could have mistaken it. The jury could not have supposed that the court intended to deprive the prisoner of the benefit of his former good character as a fact to be considered by them in weighing the evidence when the judge plainly meant that if upon all the testimony, including that as to his character, they found him to be guilty beyond a reasonable doubt, they could not acquit merely because he had always borne a good character.

On the other question, the matter would largely have rested in the sound discretion of the court had the judge found the facts, in some respects, differently upon the question of the juror's impartiality, as in the case of *S. v. Terry,* 173 N. C., 761, and the cases therein cited. *S. v. Banner,* 149 N. C., 519; *S. v. English,* 164 N. C., 498; *S. v. Foster,* 172 N. C., 960, and *S. v. Bailey,* 179 N. C., 724. But upon the facts it did not appear that the juror was not qualified.

We have given close and careful consideration to the record and all the exceptions and assignments of error, and have been unable to discover by the most diligent search any ground for a reversal.

No error.

STATE v. JOE YATES.

(Filed 5 April, 1922.)

1. **Habeas Corpus—Appeal and Error—Certiorari—Constitutional Law.**

Except in cases concerning the care and custody of children, an appeal will not lie by the prisoner from the refusal of the judge in *habeas corpus* proceedings to liberate him, his remedy being to have the case reviewed by *certiorari.* Const., Art. IV, sec. 8.

2. **Same—Appeal and Error—Dismissal—General Interest.**

The prisoner, rearrested for violating the conditions of a parol granted by the governor after the term of his sentence had expired, sued out *habeas corpus* proceedings, and upon the denial of his claim of right to be set at liberty, appealed to the Supreme Court: *Held, certiorari* being the proper procedure, the appeal is dismissed, but its merits passed upon as being a question of public importance and general interest. *In re Sermon's Land,* 182 N. C., 127; *Cement Co. v. Phillips, ibid.,* 440.

3. Pardon—Parole—Conditions.

Under the provisions of our State Constitution and Statutes, a "parole" granted by the governor to a prisoner imports a conditional pardon, and the governor may cause his rearrest either upon his own admissions, or on such evidence as he may require, for violating the conditions which the prisoner has accepted under the terms of the parole. C. S., secs. 7642, 7643, 7644, 7749, 7752; Const., Art. IV, sec. 8.

4. Same.

The power of the governor to grant a conditional pardon is generally subject to the limitation that the conditions imposed must not be illegal, immoral or impossible of performance, which do not apply to this case, wherein he is only required not to violate the statute law, and remain of good conduct.

5. Same—Breach of Conditions.

Where the prisoner has accepted his freedom upon the terms of the conditional pardon from the governor, his breach of such conditions avoids the pardon and cancels his right to further immunity from punishment.

6. Same—After Expiration of Term of Sentence—Punishment.

The essential part of a sentence for a violation of the criminal law is the punishment for the offense committed, and not the time the sentence shall begin and end; and where the prisoner has accepted a conditional pardon from the governor and has obtained his freedom, the breaking of the condition after the term would have otherwise expired, affords no legal excuse why he should not be recommitted to serve out the balance of his sentence.

APPEAL by defendant from *Connor, J.*, at December Term, 1921, of NEW HANOVER.

Appeal by defendant from judgment on writ of *habeas corpus*. In October, 1919, the defendant was tried and convicted in recorder's court of the city of Wilmington for violation of the prohibition laws, and sentenced to the roads for a term of twelve months. He had served about forty-two days of his term when, on 10 December, 1919, Governor Bickett granted the following "parole":

"To the sheriff of New Hanover County:

"Upon the recommendation of the prosecuting attorney, the judge of the recorder's court of New Hanover County, and other representative citizens, the prisoner Joe Yates, now serving a sentence on the roads of New Hanover County, is hereby paroled for the balance of his term upon condition of good behavior and remaining a law-abiding citizen, and upon the further condition that should he violate the foregoing condition he shall receive no credit of his sentence for the time he is out on parole."

Between 10 December, 1919, and 2 December, 1921, the defendant was charged with repeated breaches of the criminal law.

On 2 December, 1921, Governor Morrison issued the following "revocation of parole":

"*To the sheriff of New Hanover County*—GREETING:

"I hereby revoke the parole of Joe Yates, granted 10 December, 1919, upon satisfactory information that terms of said parole have been violated. You are hereby commanded to take the prisoner and to recommit him, in order that he may serve the remainder of his term, with no time allowed for previous good behavior, if any such time was entered to his credit.

"The prisoner was tried in the recorder's court of the city of Wilmington on 28 October, 1919, it being charged in the warrant that he violated the State prohibition law by operating a monkey-rum still and making monkey rum. The judgment of the court was that he serve twelve months in jail, to be assigned to work on the county roads of New Hanover."

On 4 December, 1921, the clerk of the Superior Court of New Hanover issued a *capias* for the defendant, and upon his arrest the defendant applied to Judge George W. Connor for a writ of *habeas corpus.* His Honor heard the petition during the December Term, 1921, of New Hanover, and, adjudging that the defendant was in lawful custody, refused to release him.

The defendant excepted and appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

J. C. King and Herbert McClammy for defendant.

ADAMS, J. In *Holley's case, Hoke, J.,* said: "Our statute law has made no provision for appeal from a judgment in *habeas corpus* proceedings, except in cases concerning the care and custody of children. Rev., 1854; C. S., 2242. Therefore, it is that when, on such a hearing a question of law or legal inference is presented, and the judgment therein involves the denial of a legal right, it may be reviewed by *certiorari,* under and by virtue of the power conferred on this Court by the last clause of section 8, Article IV, of our Constitution: 'And the Court shall have power to issue any remedial writs necessary to give it general supervision and control over the proceedings of the inferior courts.'" *In re Holley,* 154 N. C., 164; *S. v. Lawrence,* 81 N. C., 523; *S. v. Herndon,* 107 N. C., 934; *In re Croom,* 175 N. C., 455; *In re Fountain,* 182 N. C., 49. For this reason the defendant's appeal must be dismissed; but as the record presents a question of public importance and general interest, we will regard it as one of the exceptional cases that warrant consideration of the defendant's contention upon the merits. *In re Sermon's Land,* 182 N. C., 127; *Cement Co. v. Phillips, ibid.,* 440.

The Constitution confers upon the Governor the power to grant reprieves, commutations, and pardons, except in cases of impeachment, upon such conditions as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons. Constitution, Art. III, sec. 6. In the exercise of the authority granted in the provision last cited the General Assembly has prescribed certain statutory duties which are to be observed by the applicant. Every application for pardon must be made to the Governor in writing, stating the grounds upon which executive clemency is sought, and must be signed by the applicant, or by some person in his behalf; and the Governor may grant a pardon, subject to such conditions, restrictions, and limitations as he may consider proper and necessary. C. S., 7642, 7643. When the prisoner violates the conditions which he must observe or perform, the Governor, "upon receiving information of such violation," shall forthwith cause him to be arrested and detained until proper examination can be made; and if it appears by his own admission, or by such evidence as the Governor may require, that he has violated the condition of his pardon, the Governor shall order him remanded and confined for the unexpired term of his sentence. C. S., 7644. It is worthy of note, in this connection, that neither the Constitution nor the statute law authorizes a "parole," unless the word be construed as importing some form of conditional pardon. The advisory board of parole created by section 7749 merely determines whether in their judgment a person confined in the State's Prison is a proper subject of parole under a conditional pardon. Section 7752 *et seq.* We therefore regard it clear that Governor Bickett's order must be interpreted as a pardon on condition that the defendant should comply with the terms imposed. So the instant and only question is this: Did Governor Morrison have the legal right to revoke Governor Bickett's conditional pardon after the time fixed in the original sentence had expired?

"It seems agreed that the king may extend his mercy on what terms he pleases, and, consequently, may annex to his pardon any condition that he thinks fit, whether precedent or subsequent, on the performance whereof the validity of the pardon will depend." Bacon's Abr., 412. Under the modern law the power to grant a conditional pardon is generally subject to the limitation that the conditions imposed must not be illegal, immoral, or impossible of performance. The conditions contained in the parole granted by Governor Bickett cannot be impeached on either of these grounds; and the defendant by accepting the pardon accepted also the conditions subsequent, a breach of which avoided the pardon and canceled his right to further immunity from punishment.

In re Williams, 149 N. C., 436; *Fuller v. State,* 122 Ala., 32. In other words, when such breach by the defendant was duly determined, and his conditional pardon thereby avoided, the defendant at once became subject to rearrest, although the time for which he had been sentenced had expired. Any other process of reasoning would disregard the primary fact that the essential part of the sentence is the punishment and not the time when the punishment shall begin or end. This doctrine is clearly stated in *State v. Horne,* 7 L. R. A. (N. S.), 719. There the defendant was convicted in 1898 of assault with intent to murder, and sentenced to five years imprisonment; in 1901 a conditional pardon was granted; and in 1906, "long after the term of years of his original sentence had expired," the Governor of the State revoked the pardon and the defendant was recommitted to prison. The defendant contended that his imprisonment was illegal, and the lower court discharged him on the ground that the alleged breach of the conditions occurred after the period of his sentence had expired. The Supreme Court reversed the judgment, and, among other things, said: "The time fixed for executing a sentence, or for the commencement of its execution, is not one of its essential elements, and, strictly speaking, is not a part of the sentence at all. The essential portion of the sentence is the punishment, including the kind of punishment and the amount thereof, without reference to the time when it shall be inflicted. The sentence, with reference to the kind of punishment and the amount thereof, should, as a rule, be strictly executed. But the order of the court with reference to the time when the sentence shall be executed is not so material. Expiration of time without imprisonment is in no sense an execution of the sentence. *Hollon v. Hopkins,* 21 Kan., 638; *Dolan's case,* 101 Mass., 219; *S. v. Cockerham,* 24 N. C. (2 Ired. L.), 204; *Ex parte Bell,* 56 Miss., 282; *In re Edwards,* 43 N. J. L., 555; 38 Am. Rep., 653, note." And further: "The defendant in error accepted the conditional pardon, thereby securing his release from imprisonment; and he is bound by its legal conditions and limitations. The provisions of the pardon are, in effect, that if at any time during his life the defendant in error shall fail to observe its conditions, the pardon shall be null and void, and he shall be arrested to serve out the remainder of his sentence of imprisonment that he has not already actually suffered. The violation at any time of the conditions of the pardon renders it, by its terms, null and void, and the status of the defendant in error is as though he had never received the conditional pardon. If, when the conditions of the pardon are violated, a portion of the *quantum* of imprisonment fixed by the sentence has not been suffered or served, the party should be returned to serve the remainder of his time of imprisonment, as stipulated in the terms of the pardon; and, besides this, the pardon, by the breach of its conditions, is rendered in law void; and, if the sentence of imprisonment has not been fully executed, the law imposes the obligation to complete the service of imprisonment fixed in the judgment of conviction and sentence of punishment. The pardon may, as one of its restrictions and limitations, designate the time for the observance of its conditions; but, when the conditions are violated, the pardon becomes void in law, and the party is subject to the unsatisfied portion of the sentence as though no pardon had been granted."

In *S. v. Barnes,* 32 S. C., 14, the same question arose, and *McIver, J.,* said: "While it is quite true that the term of two years imprisonment, to which the defendant had been sentenced in 1883, has long since expired, yet it is equally true that the defendant has not yet suffered imprisonment for that length of time; and as the pardon which he pleads has been adjudged insufficient to relieve him from suffering the whole punishment originally imposed upon him, it follows, necessarily, that he is still liable to be required to complete the term of imprisonment originally imposed, just as if he had escaped during that term. And such is the clear result of the authorities, both English and American."

These and other decisions fairly illustrate the principle which we think should be applied in the case at bar. There are others which apparently are in accord with the defendant's contention, but our researches have convinced us that the conclusion we have reached is supported by the better reasoning and authority. *Fuller v. State,* 122 Ala., 32; *S. v. McIntire,* 59 Am. Dec., 576 N; *Ex parte Hawkins,* 61 Ark., 321; *S. v. Chancellor,* 47 Am. Dec., 557; *S. v. Smith,* 19 Am. Dec., 679.

In our opinion the defendant cannot maintain his defense of exemption from rearrest on the ground that the breach of his parole took place after the expiration of the time for which he was originally sentenced.

The appeal is dismissed.

STATE v. HOUSTON M. EVANS.

(Filed 5 April, 1922.)

1. **Intoxicating Liquor — Spirituous Liquor — Manufacture—Evidence—Character—Alibi.**

Evidence tending to show that upon raiding a whiskey still the officers of the law saw at a distance a small white man and a negro operating it, who fled at their approach, the white man about the size of the defendant, leaving his coat, in which was found a picture of a woman acknowledged by the defendant to be his wife, with certain letters from her and a Virginia lawyer in regard to an indictment: *Held*, competent for the solicitor to question the defendant on the stand as to his having abandoned his wife, and as to the indictment in Virginia, as tending to impeach his character and shake his denial of being at the still, and as to his attempt to prove an *alibi*.

2. **Trials—Evidence—Colloquies Between Counsel and Witness—Presumptions—Action of Judge—Appeal and Error—Harmless Error.**

   Colloquies between attorneys and witnesses aside from the purpose of the evidence should be avoided, both in criminal and civil trials, but assuming that the jury will determine the controversy upon the evidence, such will not be held for reversible error, when the trial judge takes prompt and sufficient action in eradicating their effect.

3. **Appeal and Error—Prejudice—Remarks of Counsel—New Trials.**

   Where upon the trial for the unlawful manufacture of liquor the court has told the solicitor it was improper for him to argue to the jury matters not in evidence, as that certain offenders carried spirituous liquors for a considerable distance into other states for the purpose of sale, the remarks of the solicitor thereafter that the jury all knew this was done, *is held* to be prejudicial to the defendant, entitling him to a new trial under the evidence of this case.

APPEAL by defendant from *Devin, J.*, at November Term, 1921, of GRANVILLE.

The defendant was convicted on an indictment for manufacturing liquor. The testimony for the State was that officers Hutchins, Hobgood, Walters, Bowling, and Newton, on the afternoon of 26 June, 1921, went out on Bearskin Creek, in Granville County, and found a still being operated by a white man and a negro. When the officers got within about 20 steps of them, both ran. The white man dropped a coat which he had in his hand. He was small and slight, and about the same size as the defendant. In the coat which was dropped was found a photograph which the defendant on the stand admitted was a picture of his wife and letters from her to him and a subpœna from a Virginia court to him and a letter from a Virginia lawyer. This coat was dropped by the white man, who wa about the same size as defendant, as he ran away from the still which he was assisting in operating. The defendant attempted to explain the presence of his coat at this still by testifying that on 23 June he and a man named Chandler rode over from South Boston, Va., to Oxford, and while on the way the coat dropped off the door of the car on which it was lying. The defendant was corroborated on this point by testimony of two men, Chandler and Green, who also testified in corroboration of defendant's *alibi* that they were fishing together at Barnett's pond in Person County on that date, 26 June.

The State, in reply, introduced a justice of the peace, a county policeman, and a deputy sheriff, all from South Boston, who testified that the character of the defendant and Chandler and Chrismus was bad. It was admitted by the defendant that he had been convicted in Virginia for having liquor, but he claimed that he had appealed. Verdict of guilty, judgment, and appeal.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

D. G. Brummitt for defendant.

CLARK, C. J. The motion for nonsuit was properly denied. The defendant made exceptions to the question by the solicitor as to whose picture it was which was found in the pocket of the coat which he admitted was his, and he was asked, to impeach the witness, questions as to whom the letter was from, and whether he had not deserted his wife, and similar questions. The witness admitted that the picture was that of his wife, denied that he had deserted her, and said that they had been divorced. These and other questions along that line were competent to impeach the character of the defendant, and to shake his evidence in denial of being at the still, and as to the attempt to prove an *alibi*.

At one point in the cross-examination, when the solicitor asked the defendant if his wife was not taking care of his children, and he denied it, the solicitor said, "It is so." Counsel for the defendant, in arguing the case before the court, stated that this was said very loudly, while the Assistant Attorney-General represented it as having been said in a low tone as a "side" remark. The record does not show which was right as to this.

The jury are presumed to be men of intelligence, and can hardly ever be influenced by such by-play. Certainly there was no error committed by the court, for he instructed the jury not to consider it, and the solicitor both withdrew the remark and apologized. *S. v. Saleeby, ante,* 740. It was a collateral matter in a cross-examination to impeach the defendant, who had put his character in evidence by going upon the stand, and the jury must have fully understood that they were to acquit or convict the defendant upon the evidence as to the commission or innocence of the offense with which he was charged.

Such colloquies between counsel and witnesses, on cross-examination, whether in civil or criminal actions, are not orderly, and should always be avoided. It could hardly have had any effect, as the solicitor, in a few minutes, was arguing to the jury that the statement of witness "was not so." Besides, the judge interposed, and the solicitor apologized.

The solicitor further asked the defendant if he received the letter which was found in his pocket "from your lawyer in Virginia." The defendant's counsel objected to any reading or examination of these letters, and asked if the solicitor thought he had a right to read that letter to the jury or examine the witness about it. It does not appear from the record that the solicitor had offered to read the letter or made any statement or suggestion as to its contents, but on this suggestion from the defendant's counsel the solicitor countered by turning to the jury, and smiling, said that he would like to read it. We do not see that this remark could have had any bearing with the jury in any way. Their verdict necessarily must have turned upon whether the evidence identified the defendant as the man who was found at the still engaged in manufacturing.

The solicitor further asked if the defendant had not been convicted in a liquor case in Virginia. The defendant admitted that he had been, but denied his guilt, and said that the case had been appealed, and testified that he never made any liquor and never sold any. The solicitor in his argument to the jury mentioned a case in Roxboro in which it was shown that a negro from there continually went to South Boston for blockade liquor. Defendant's counsel objected upon the ground that there was no evidence connecting the defendant with the transaction. The court sustained the objection, saying, "The solicitor must confine himself to the evidence." The solicitor further stated in his speech that men who live in one state go 100 miles into another state to get liquor, and that a still had been established on the border land between the two states by a negro from Apex. The defendant's counsel again objected, and the court held that it "was not proper for the solicitor to argue to the jury matters not in evidence, or state particular facts in other cases," and instructed the jury not to consider the same.

But the solicitor, it appears, then said, "Well, gentlemen of the jury, you all know of that affair, and all of us know that men manufacture liquor in one state and carry it 250 miles into another state to sell it." The defendant's counsel objected to this remark. Doubtless it is a matter of common knowledge that illicit liquor is continually carried across state lines for sale, but we cannot say that the conduct of the solicitor in repeating this remark after the court had ruled out such remarks as to matters not in evidence was harmless error. It may have had no influence upon the verdict of the jury, but certainly the solicitor should not have repeated the remark after the court had ruled, and properly, that such statements should not be made by the solicitor. There was no exception to the judge's charge, but for the reason just given we think that the defendant is entitled to a

New trial.

STATE v. BOB FRESHWATER.

(Filed 5 April, 1922.)

Automobiles—Speed Limits—Cities and Towns—Statutes—Ordinances.

Town ordinances regulating automobiles, speed limits, etc., within the town in conflict with the statutes on the subject, C. S., 2599, 2618, are void under the provisions of C. S., 2601, and apart from the express provisions of the last named section, they must yield to the statute law of the State, such powers being a delegated legislative function.

APPEAL by defendant from *Kerr, J.,* at February Term, 1922, of ALAMANCE.

Defendant was convicted of violation of an ordinance of the city of Burlington.

The ordinance is as follows: "That the speed limit on all automobiles, motor cars, electric and steam vehicles of any and all kinds shall not exceed eight miles an hour over the streets in what is known as the fire limits; and through and over any other streets of the city of Burlington the speed limit shall not exceed fifteen miles an hour; that in turning from one street to another, the signal must be given, and that the mufflers on all automobiles shall not be open within the fire limits.

"Any person violating any of the provisions of this ordinance shall, upon conviction before the mayor, be punished by a fine of $5; for the second offense, or any subsequent offense, he shall be punished by a fine of $10; and upon conviction of the third offense the permit to operate automobiles or other motor vehicles shall be canceled." Sections 57-B, 57-H.

At the close of the State's evidence, the defendant moved to dismiss as in case of nonsuit. C. S., 4643. The motion was overruled, and the defendant excepted. Verdict of guilty; judgment, and appeal by defendant.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

William I. Ward for defendant.

ADAMS, J. The ordinance is plainly in conflict with C. S., 2599 and 2618. Section 2601 inhibits the governing body of a municipal corporation from passing any ordinance contrary to the provisions of the chapter in which these sections are found. But without regard to this statutory inhibition, the conflict would be fatal. Municipal ordinances are ordained for local purposes in the exercise of a delegated legislative function, and must harmonize with the general laws of the State. In case of conflict the ordinance must yield to the State law. The motion to dismiss the action should therefore have been allowed. *Washington v. Hammond*, 76 N. C., 33; *S. v. Langston,* 88 N. C., 693; *S. v. Brittain,* 89 N. C., 574; *S. v. Keith,* 94 N. C., 933; *S. v. Austin,* 114 N. C., 855; *S. v. McCoy,* 116 N. C., 1059; *S. v. Black,* 150 N. C., 866. On the defendant's motion the judgment is reversed, and this will be certified.

Reversed.

STATE v. S. T. HOOKER.

(Filed 5 April, 1922.)

1. Appeal and Error—Habeas Corpus—Certiorari.

No appeal to the Supreme Court lies upon the refusal of the judge, having jurisdiction, to release the petitioner in *habeas corpus* proceedings, except in cases concerning the care and custody of children, the remedy being by application for the writ of *certiorari* which lies in the discretion of the appellate court; and an appeal by the petitioner under sentence for contempt of court will ordinarily be dismissed. In this case, with the consent of the attorney-general, the court passes upon the appeal as if on *certiorari.*

2. Habeas Corpus—Statutes.

The petitioner in *habeas corpus* proceedings adjudged in contempt of court shall, under the provisions of our statutes, be remanded when upon the hearing it is made to appear that he is held in custody by virtue of a process issued by a court or judge of the United States where such judge or court has exclusive jurisdiction; by virtue of a final judgment or decree of any competent court of civil or criminal jurisdiction or of any execution issued upon such judgment or decree; for any contempt, specially and plainly charged in the commitment by some court, officer or body having authority to commit for the contempt charged; that the time during which such party may be legally detained has not expired.

3. Habeas Corpus—Courts—Jurisdiction—Record.

Where the petitioner in *habeas corpus* proceedings is held under a final sentence of a court, a commitment of contempt or other, the only questions open to inquiry at the hearing are whether on the record the court had jurisdiction of the matter and whether on the facts disclosed in the record and under the law applicable to the case in hand, the court has exceeded its powers in imposing the sentence whereof the petitioner complains.

4. Courts—Contempt of Court—Justices of the Peace—Habeas Corpus—Statutes.

While engaged in the trial of causes before him the mayor of a town, with jurisdiction of a justice of the peace, went just without the door of his office for a moment or two, and while there was insulted and vilely abused and threatened with attempted assault by the petitioner in *habeas* *corpus* proceedings for having had a warrant issued for the petitioner's son under a criminal charge: *Held,* such acts and conduct of the petitioner constitute a direct contempt, authorizing punishment by imprisonment not to exceed thirty days or a fine not to exceed $250, or both, in the discretion of the court. C. S., 981.

5. Same—Constitutional Law—Inherent Powers.

The constitutional restriction imposed by the Constitution on the jurisdiction of justices of the peace to fines of $50 and imprisonment for thirty days, Article IV, sec. 27, apply only to the administration of the law in the trial of criminal cases, and were not intended to affect the inherent or statutory powers possessed by these courts and conferred upon them as necessary to enable them to transact business and maintain a proper respect for their authority, and in this interpretation weight is given to a like interpretation of our statute giving such courts power to punish by imprisonment not exceeding thirty days or a fine not exceeding $250, or both, in the discretion of the court, it being the same given to the judges of the Superior Courts, and other courts of record, for like offenses. C. S., 981, 983.

6. Habeas Corpus—Legal Detention—Sentence—Valid in Part.

Where a prisoner is detained by virtue of a sentence in part valid, and part otherwise, he may not be liberated on *habeas corpus* until he shall have served the valid portion of his sentence, and he shall be remanded when it appears that the time during which he may legally be detained has not expired.

PETITION for *habeas corpus, In re S. T. Hooker,* heard before *Lyon, J.,* holding the courts of the Fifth Judicial District, Fall Term, 1921, at the courthouse in Greenville, N. C., on 12 September, 1921; from PITT.

On said hearing it was made to appear that D. M. Clark, Esq., mayor of the town of Greenville and as such clothed by statute with the jurisdiction of a justice of the peace, on 12 September, 1921, was engaged in hearing causes in his office in Greenville, N. C., and having disposed of one case and taken up another, for a moment stepped just outside of the back door to get his spittoon, when he was approached and abused and assaulted by the petitioner on his action as mayor in having issued a criminal warrant for petitioner's son; that on rule and *capias* issued, said mayor adjudged said petitioner guilty of contempt of court, sentenced him to jail for thirty days and imposed a fine of $200, and petitioner was committed and held in custody under said judgment, when present proceedings were instituted.

In more direct reference to the occurrence, his Honor, confirming the action of the mayor in this respect, finds the facts and conclusions of law as follows: "That on the same morning that S. D. Hooker was put in the lock-up, to wit, 12 August, 1921, the mayor held court in his private office for the disposition of two emergency cases; that he had disposed of one case, and was in the act of taking up and disposing of the second case when he stepped outside of his back door to get a spittoon, he had turned to go back into his office when he was called by the respondent, S. T. Hooker, who at the time was in the rear of the office of J. C. Lanier, he said in his usual tone of voice, "Come here a minute, Clark." The mayor took the respondent to be rational, and approached the respondent at a point within a few feet from his office and in the rear of the office of J. C. Lanier, the two offices adjoining; he was met by the respondent, S. T. Hooker, S. D. Hooker, and J. C. Lanier; the respondent faced the mayor and commenced to accost him in a very angry, menacing, and threatening manner, asking the mayor, "What in the hell did you issue a warrant against my son, S. D. Hooker, for?" then and there denouncing the mayor, calling him a liar, a common street loafer, a leech upon the community, and a son-of-a-bitch, shoving him off with a push on the shoulder, at the same time opening a pocket knife, which he held behind him in a position ready to strike; the knife was taken from the respondent by a police officer, Stokes, who had come out of the mayor's office, attracted by the loud, abusive language of the respondent to the mayor.

The mayor did not attempt to strike or resist the attack or the language of the respondent, using no loud, abusive, or profane words, simply saying, "I don't care to have any argument. The matter can be settled in court." The mayor then walked back to his office, the respondent following him, and continuing to abuse, slander, curse, and denounce him.

"The denunciatory and abusive language and the assault of the said S. T. Hooker was contemptuous and interfered with the mayor, and prevented him from the proper and lawful discharge of his official duties, and was had and done for the purpose of intimidating the mayor in the performance of his duties in the trial of the said S. D. Hooker, and said conduct was committed while the court was actually sitting for the transaction of business."

And upon these and other findings the court entered judgment as follows: "Upon the foregoing facts it is considered, ordered, and adjudged by the court that the acts and conduct of the respondent were contemptuous, and brought contumely and insult upon the court, and were committed in the presence of the court, and it is further considered and adjudged that the said S. T. Hooker was in contempt of said court.

"It is further ordered and adjudged that the findings of D. M. Clark, mayor, be and the same are hereby fully sustained, and it is ordered and adjudged that the said S. T. Hooker be and he is hereby adjudged to be in contempt of the court of D. M. Clark, mayor.

"It further appearing that the judgment of the court exceeded the jurisdiction of the mayor, in that he could only fine the said Hooker $50 or imprison him 30 days; it is, therefore, considered, ordered, and adjudged that this cause be remanded to the mayor of the town of Greenville, to the end that judgment be entered herein pursuant to law, by said mayor, D. M. Clark."

From which said judgment the petitioner appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

J. C. Lanier and H. W. Whedbee for defendant.

HOKE, J. Our decisions hold that except in cases concerning the care and custody of children no appeal lies from a judgment in *habeas corpus* proceedings, but the action of the judge must be reviewed, if at all, by writ of *certiorari,* which rests in the sound discretion of the appellate court. *In re McCade, ante,* 242, citing, among other authorities, *In re Lee Croom,* 175 N. C., 455; *In re Holley,* 154 N. C., 163.

Under these, and other decisions to like effect, this appeal, therefore, should be dismissed, but for the fact that the Attorney-General, waiving notice, has consented that the cause be heard and determined as on writ of *certiorari,* if such course meets the approval of the Court. The Court having so determined and considered the cause in that aspect, it appears that the defendant has been found guilty of direct contempt of the mayor's court of the city of Greenville, in violent abuse, and direct assault on the mayor while engaged in the administration of public justice and in the exercise of jurisdiction with which he is clothed. For such conduct he is held in custody under a sentence by the mayor, imposing imprisonment for thirty days and a fine of $200, and sues out this writ of *habeas corpus* to inquire and determine as to the legality of his detention.

It is held with us that the writ of *habeas corpus* cannot be made to serve the purpose of an appeal or writ of error. And our statute on the subject provides that on a hearing of this character the prisoner shall be remanded when it appears that he is held in custody:

1. By virtue of a process issued by a court or judge of the United States, in a case where such judge or court has exclusive jurisdiction.

2. By virtue of a final judgment or decree of any competent court of civil or criminal jurisdiction, or of any execution issued upon such judgment or decree.

3. For any contempt, specially and plainly charged in the commitment by some court, officer, or body having authority to commit for the contempt charged.

4. That the time during which such party may be legally detained has not expired.

And in the application and construction of these principles and the statutory provisions cited, it is the accepted position that where one is held under a final sentence of a court, a commitment of contempt or other, the only questions open to inquiry are whether on the record the court had jurisdiction of the matter, and whether on the facts disclosed in the record and under the law applicable to the case in hand, the court has exceeded its powers in imposing the sentence complained of. *In re Lee Croom,* 175 N. C., 455; *In re Holley, supra.*

Speaking to the question in *Holley's case, supra,* the Court said: "And in determining this question of power the court is confined, as heretofore stated, to the record proper and the judgment itself. It is not permitted that the testimony or the rulings therein should be examined into, nor that matters fairly in the discretion of the presiding judge should be reviewed, or that judgments erroneous in the ordinary acceptation of the term should be questioned. The hearing is confined to the record and judgment, and relief may be afforded only when on the record itself the judgment is one clearly and manifestly beyond the power of the court, a statement of the doctrine supported in numerous and authoritative decisions here and elsewhere," citing *Ex parte McCown,* 139 N. C., 95; *In re Schenck,* 74 N. C., 607; *In re Swan,* 150 U. S., 637; *In re Coy,* 127 U. S., 731.

This being the recognized principle that prevails in a hearing and case of this kind, our statute on contempts being C. S., ch. 17, sec. 978 *et seq.,* constitutes the acts and conduct of defendant, as established in this case, a direct contempt, authorizes punishment by imprisonment not to exceed thirty days or fine not to exceed $250, or both, in the discretion of the court, C. S., 981, and in express terms confers power to impose it on "every justice of the peace, referee, commissioner, clerk of the Superior, inferior, or criminal court, on the judges of Superior and Supreme Court, board of commissioners of Corporation Commission, when sitting on the trial of causes or engaged in official duties." C. S., 983.

Defendant having been convicted and sentenced under the provisions of the statute, this is a final sentence, from which no appeal lies in the ordinary acceptation of the term, and where under the authorities cited, and others of like kind, can only be reversed or modified for a lack of power or jurisdiction of the court imposing the sentence. *In re Croom, supra; S. v. Little,* 175 N. C., 743; *In re Brown,* 168 N. C., 417; *Ex parte McCown,* 139 N. C., 95.

It is urged for petitioner that this sentence is beyond the power of the mayor's court, which is only vested with the jurisdiction of a justice of the peace, and whose powers, therefore, under Article IV, section 27, of the Constitution, are restricted to a fine of $50 or imprisonment for 30 days, but the Court is of opinion that the limitations of this article and section apply, and were designed to apply, to the ordinary administration of the law in the trial of criminal causes, and were not intended to affect the inherent or statutory powers possessed by these courts and conferred upon them as necessary to enable them to transact business and maintain a proper "respect for their authority." This is undoubtedly the Legislature's construction of the section of the Constitution referred to, for. as we have said, the statute, in express terms, confers the power to punish *and* fine to the amount stated on the justices of the peace as well as on courts of record, and there are decisions here and elsewhere which strongly favor this view. *In re Griffin,* 98 N. C., 225; *S. v. Lyon,* 93 N. C., 575; *People v. Toole,* 35 Col., 225; 6 R. C. L., title Contempt, sec. 43.

In *Griffin's case, supra,* speaking to the distinction and some of the differences that exist between proceedings for contempt and the ordinary administration of the criminal law, *Smith, C. J.,* said: "The one belongs to the general administration of the criminal law, the other is the exercise of judicial authority inherent in the court, and indispensable in the exercise of its functions. If the act which shows the contempt constitutes a criminal offense, it may be prosecuted and punished as such notwithstanding the contempt may also be punished."

And in *S. v. Lyon, supra,* in which it was held that a justice of the peace, in proper cases, had the power to require an adequate bond to keep the peace, and no appeal would lie, though the result might, in its practical operation, work an imprisonment far beyond the thirty days limitation on a justice's jurisdiction, *Merrimon, J.,* said: "This view is not in conflict with the provisions of the Constitution, Art. IV, sec. 27, and the statute on the subject. These provisions have reference to criminal cases wherein the magistrate gives judgment against a party charged with a criminal offense and imposes on him a punishment therefor."

And in no event would the petitioner be entitled to his discharge on the facts of the present record. Even if the statute authorizing justices to both fine and imprison for direct contempt of court were invalid as violating the constitutional restrictions on their criminal jurisdiction, these courts have, with us, and without any statute, the inherent power to punish for direct contempt, when engaged in the administration of the State's justice, and in the exercise of the jurisdiction and powers conferred upon them by the law. *In re Deaton,* 105 N. C., 59; *Scott v. Fishblate,* 117 N. C., 265; *S. v. Aiken,* 113 N. C., 651.

And this being true, even if the fine of $200 were invalid, the portion of the judgment inflicting an imprisonment for thirty days would be well within the constitutional provisions, and must be enforced according to its terms.

It is the established principle in cases of this character that when a prisoner is detained by virtue of a sentence in part valid, and part otherwise, he may not be liberated on *habeas corpus* till he shall have served the valid portion of his sentence. *In re Holley, supra,* citing *U. S. v. Pridgen,* 153 U. S., 48; *Ex parte Erdman,* 88 California, 578. A position directly recognized and approved in subsection four of our statute on *habeas corpus* as above quoted, "that the prisoner shall be remanded when it appears that the time during which he may be legally detained has not expired."

This will be certified that the judgment of the mayor's court be enforced as entered.

Modified and affirmed.

CLARK, C. J., did not sit.

STATE v. KATE HAUSER AND CURTIS GENTRY.

(Filed 12 April, 1922.)

1. **Larceny—Indictment—Proof—Variance.**

The charge in the indictment was for the larceny of a diamond. The proof that it was a large diamond set in the center of a brooch surrounded by pearls and small diamonds, is not a fatal variation between the charge and proof.

2. **Same—Husband and Wife—Constitutional Law.**

Where the indictment charges larceny of a diamond as from the husband, when it was in fact the property of his wife, and they were living together as husband and wife, and he had charge of her affairs and of the property in the house, he has such special property in the article stolen as will sustain a conviction, notwithstanding the constitution recognizes the wife's right in her individual property.

3. **Receiving Stolen Goods—Larceny—Indictment—Evidence—Questions for Jury—Trials.**

Where there is evidence that a colored nurse has stolen a diamond from her employer, which was missing on the night she spent at the house of her codefendant charged with receiving, and that her codefendant sold the diamond for about one-tenth of its value on the morning following, is sufficient of his receiving with knowledge that the diamond had been stolen to sustain a verdict convicting him of the offense.

4. **Same—True Owner.**

Where there is evidence that the codefendant in an action for larceny knew that a diamond had been stolen and that he had himself stolen it from the thief, it is immaterial whether he had stolen it from the thief or the true owner, both acts being against the right of the true owner, and chargeable in the same bill as parts of the same illegal asportation.

APPEAL by defendants from *Harding, J.,* at January Term, 1922, of FORSYTH.

The defendants were charged with stealing one diamond of the value of $700, the property of M. P. Orr, and for receiving the same knowing it to be stolen. The defendant Kate Hauser was found guilty of larceny of the stone, and Curtis Gentry guilty of receiving the same knowing it to be stolen. Judgment; appeal by both defendants.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Holton & Holton and H. M. Ratcliff for Kate Hauser.

C. W. Stevens for Curtis Gentry.

CLARK, C. J. The indictment charged the larceny of one diamond of the value of $700, the property of M. P. Orr. The evidence for the State, if believed, is conclusive that Kate Hauser was guilty of larceny of the diamond, which was a large diamond set in the center of a brooch, surrounded by pearls and small diamonds. She stole the brooch and it was later recovered in the same form as stolen There was no separation of the diamond from the brooch. The defendant's counsel contends, however, that larceny of a diamond being charged in the bill and the proof being that it was set in the brooch, was a fatal variance. If the defendant stole the diamond it makes no difference whether it was attached to the brooch or in a bag or box or lying about loose. *S. v. Harris*, 64 N. C., 128, in which the charge was for larceny of "50 pounds of flour," and the proof showed theft of a sack of flour. This was approved in *S. v. Nipper*, 95 N. C., 655, and in *S. v. Kiger*, 115 N. C., 750. In this last case the charge was theft of so many gallons of brandy and the proof was of so many barrels of brandy, which was held sufficient.

The defendant further takes the objection that the indictment charged that the diamond was the property of M. P. Orr, and that it appeared in the evidence that it was the property of his wife; but the two were living together as husband and wife, and he had charge of her affairs and of the property in the house, and therefore had possession with her of her legal effects. He therefore had possession, which was equivalent to a special property therein, notwithstanding that the Constitution recognizes the wife's rights in her individual property. *S. v. Wincroft*, 76 N. C., 38; *S. v. Matthews, ibid.*, 41; Bishop New Criminal Procedure, p. 1687.

The other defendant, Curtis Gentry, besides raising the two questions which are above raised on behalf of Kate Hauser, insisted there was no evidence in the case that he receivd the diamond knowing it to be stolen; but there was evidence, if believed, from which it appears clearly that

Kate Hauser carried the brooch to Curtis Gentry's house. She was a colored nurse, and the testimony is that the brooch was worth about $600. He sold it for $50. The testimony is that she spent the night at his house and the next morning the brooch was missing. Kate Hauser testified that he stole it from her. The conflict in the evidence on this point is not material, for whether he received it to sell for her, knowing it to have been stolen, or stole it from Kate Hauser, he evidently knew that she had obtained the brooch unlawfully, and it could be charged either as her property or as the property of the true owner. Wharton, sec. 1825; *Ward v. People,* 3 Hill, 396, both cited in *S. v. Wincroft,* 76 N. C., 40. Being the same article, the larceny or receiving was against the rights of the owner, and could be charged as parts of the same illegal asportation in the same bill.

There are some other exceptions, but we do not think that they present questions that require discussion. We have, however, fully examined them, and after hearing the learned argument of the counsel, we find

No error.

STATE v. CHARLES JESSUP.

(Filed 12 April, 1922.)

1. **Automobiles—Statutes—Criminal Negligence—Evidence—Manslaughter—Criminal Law.**

Upon a trial for manslaughter alleged to have been caused by the defendant's criminally and recklessly driving an automobile upon a public highway under circumstances prohibited by statute, there was evidence tending to show that the deceased, being driven by his son in another automobile, on the proper side of an improved road, twenty-two feet wide, was rounding a curve near an embankment on the outside of the road, when the prisoner and others, in an intoxicated condition, going in the opposite direction, with unobstructed view, ran across from inside of the road where he should have remained, and with fifteen feet to spare, collided with the automobile in which the deceased was riding, causing his death: *Held* sufficient to sustain a verdict of conviction. C. S., 2617, 2618; *S. v. Rountree*, 181 N. C., 535, cited and applied.

2. **Same—Intoxication.**

Where there is evidence that the defendant by his criminal recklessness in driving his automobile on a public highway, prohibited by statute, collided with that in which the deceased was riding, causing his death, testimony as to the intoxicated condition of other men in the automobile with him at the time, together with the fact that some of them had whiskey, and the defendant's effort to borrow money to enable his brother to buy whiskey, with direct evidence of the defendant's intoxicated condition, is competent as a part of the *res gestæ* to show the defendant's opportunity to obtain whiskey at the time, and the purpose to have it on this occasion. C. S., 2617, 2618.

3. **Evidence—Opinion Upon the Facts—Intoxication—Automobiles—Criminal Negligence—Statutes.**

Where relevant as a part of the *res gestæ* upon the trial for manslaughter, for the criminally reckless driving of an automobile on a public highway (C. S., 2617, 2618), the impression of a witness from his own observation of the conduct and appearance of the defendant at the time, that the defendant was then under the influence of whiskey, is competent.

APPEAL by defendant from *Long, J.*, at October Term, 1921, of SURRY.

Indictment for manslaughter, caused by negligently running an automobile, thereby causing the death of one O. N. Swanson.

There was evidence on the part of the State tending to show that the Swansons, the father, O. N. Swanson, and son, Claude Swanson, driver, on the front seat, two daughters and a younger son on a rear seat, were traveling in a Mitchell car on the improved highway going north from Pilot Mountain to Westfield about three o'clock p. m. on 12 June, 1921.

About four miles from Pilot Mountain, and on a curve in said road, a Ford, driven by the defendant and occupied by himself and other young men, had a head-on collision with the Mitchell car just at the curve, and in consequence of such collision Mr. O. N. Swanson was seriously injured and died soon afterwards. At the curve, the point of collision, the road was twenty-two feet wide. Immediately to its right was an embankment. The Mitchell car, going north, was running to the right of the center of the road, within twelve or fifteen inches of the embankment. The Ford car, coming south, instead of taking the right at the curve, cut across the curve, and at the time of the collision was plainly on the right of way of the Mitchell car. The radiator of the Mitchell car showed that it was a head-on collision. After the collision (record, p. 7), "The Swanson car was something like a half foot from the bank; that is the right front wheel. The Jessup car something like 2½ feet, probably three feet. The rear of the Swanson car was 2½ feet from the bank and the rear of the Jessup car 4 or 4½. Where the cars were standing when I saw them, they were further towards Westfield. I do not know where the cars had skidded; both cars were pointing toward the bank." At the point of collision, the Ford car, if properly driven, would have had 15 feet of passage room to the right of the Mitchell car. There was a road called the Bryant road which entered the improved highway about opposite the point of collision.

Cy Bryant testified (record, p. 9): "I live about three hundred yards west of the place where the collision occurred. There is a road leading from my father's house to the main road. At the time of the collision, I was coming from my father's house and got to the cherry tree where I saw two cars coming, *both on the right, hugging the curve.* I stopped about 30 steps from the highway. The Swanson car was going north, the Jessup car south. The Swanson car pulled to the right, very near the bank; the Jessup car cut to the left right against Swanson, then I heard the crash. Charlie Jessup was driving. Claude Swanson was driving Swanson's car. I stepped the distance from where I stopped to the road, and it was thirty steps."

At the curve one could see from the south going north 127 feet. There is evidence that the defendant was drinking the day of the accident, and his reputation as a whiskey drinker was bad.

There was evidence for defendant tending to show that the collision occurred at or near the center of the highway; that Charles Jessup was not drinking or under the influence of liquor on the occasion; and at or about the time of the occurrence the attention of the defendant was attracted by the approach of a third car, from a side road, and which was about to enter the highway at or near the point where defendant's car then was. The jury rendered a verdict of guilty of manslaughter, and judgment on the verdict, and defendant excepted and appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

J. H. Folger for defendant.

HOKE, J. Notwithstanding the earnest and forcible presentation of his case by defendant's counsel, we are constrained to hold that no reversible error has been shown in the record.

The jury, accepting the State's version of the matter, have convicted the defendant of causing the death of O. N. Swanson, as charged in the bill of indictment, by his criminal negligence in driving his car on the wrong side of the road, and in operating the same without taking reasonable and proper care, contrary to the provisions of the statute applicable. C. S., 2617-2618.

Both of these sections were enacted as necessary to a proper protection of persons upon the highways of the State, and because, with the high-power vehicles now very generally in use, a violation of these regulations was not unlikely to result in serious and oftentimes in fatal injuries. In the recent case of *S. v. Rountree,* 181 N. C., 535, *Associate Justice Stacy,* in a clear and forcible opinion, deals with these statutes and the underlying reasons for their enactment, and it was there held, among other things, as pertinent to the facts of the present record:

"Where one is tried for the reckless driving of an automobile made criminal by our statute (C. S., 2618), and an unintentional killing has been established by him, evidence is sufficient for conviction of manslaughter which tends to show such recklessness or carelessness as is incompatible with the proper regard for human life or limb, or that such injury was likely to occur under the circumstances.

"The commission of a dangerous act, in itself a violation of a statute, intended to prevent injury to the person, when death to another ensues, renders the actor guilty of manslaughter at least.

"Where an act makes reckless driving of automobiles upon the public highways, under certain conditions, a criminal offense, and there is a proviso fixing various speed limits thereon as to different localities and conditions criminal negligence *per se* and indictable, the proviso as to the speed limits does not necessarily preclude conviction of the offense prescribed in the body of the act for recklessness while driving at less speed."

It was insisted for defendant that prejudicial error was committed in the admission of certain testimony over his objection, tending to show that others of the party had liquor on the occasion and showed evidences of being under its influence. There was direct testimony to the effect that defendant also had taken whiskey at the time, and the statements objected to were not only competent as presenting the conditions existent at the time of the occurrence, a part of the *res gestæ*, but also as tending to show that defendant had every opportunity for obtaining whiskey at the time. And the testimony also objected to that defendant on the morning of the same day had endeavored to borrow $5 for the purpose, professed by him at the time, to enable his brother to buy whiskey, bore directly on the fact that defendant and his party in the car had the purpose of providing themselves with whiskey for the occasion.

Again it is urged that a witness was allowed to express that "defendant a short time before the occurrence was under the influence of liquor." This was given as the impression of the witness from the conduct and appearance of defendant under the witness's actual observation at the time, and where relevant, is held competent as the statement of a fact. *Taylor v. Security Co.*, 145 N. C., 383; *Gilliland v. Board of Education*, 141 N. C., 482.

The case, in its essential aspects, is controlled by *S. v. Rountree, supra*, and as stated, there has been no error committed in the trial of the cause.

No error.

STATE v. SEBORN STRANGE.

(Filed 12 April, 1922.)

1. **Criminal Law—Judgments—Condition of Good Behavior—Rearrest.**

Where the trial judge ascertains that the defendant in a criminal action has violated the condition of good behavior, upon which judgment had been rendered against him at a prior term of court, and orders him into custody under the judgment previously rendered, it is not objectionable as pronouncing judgment in that case, but is in conformity with our decisions.

2. **Criminal Law — Indictment — Counts—General Verdict—Evidence—Presumptions.**

Where there is evidence to sustain a conviction on one or several counts of an indictment, a general verdict will be presumed to have been returned on the count or counts to which the evidence applies.

APPEAL by defendant from *Long, J.,* at October Term, 1921, of SURRY.

The defendant was prosecuted on an indictment containing four counts, charging him (1) with the unlawful sale of liquor; (2) with having liquor in his possession for the purpose of sale; (3) with unlawfully receiving liquor; and (4) with the unlawful transportation. His Honor instructed the jury upon the evidence relating to the second, third, and fourth counts. There was a general verdict of guilty.

The defendant, at a previous term, had pleaded guilty of unlawfully receiving liquor, and judgment had been suspended upon payment of costs, the defendant having given bond to appear at each criminal term for two years and show his good behavior, in default of which a capias was to issue and the defendant was to be worked on the roads for twelve months. This case is No. 40. At the October Term, 1922, he was convicted of retailing in No. 46, and in No. 21 there was a verdict of guilty as above stated. In No. 40 his Honor found that the defendant had not been of good behavior, and ordered him into the custody of the sheriff under the sentence pronounced at the former term to the end that the sentence should be executed. In No. 46 the defendant was sentenced to twelve months on the roads, the service to begin at the expiration of the sentence in No. 40; and in No. 21 the prayer for judgment was continued.

The defendant excepted and appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

J. H. Folger for defendant.

ADAMS, J. The defendant assigns as error "his Honor's pronouncing judgment" in the case in which the defendant had pleaded guilty at a previous term. But the record shows that his Honor, instead of pronouncing judgment, ordered the defendant into custody under the judgment previously rendered, upon finding that he had not complied with its terms. This procedure is sustained by the decisions of this Court. *S. v. Everitt,* 164 N. C., 399; *S. v. Greer,* 173 N. C., 759; *S. v. Hoggard,* 180 N. C., 678.

The defendant contends, in the second place, that there was no sufficient evidence to support his Honor's instruction as to the unlawful transportation of the liquor. If this should be granted, still in support of two other counts there was ample evidence, and the jury returned a general verdict. Where there are several counts in an indictment, and there is evidence relating only to one, a general verdict will be presumed to have been returned on the count to which the evidence applies. *S. v. Long,* 52 N. C., 24; *S. v. Cross,* 106 N. C., 650; *S. v. Toole, ibid.,* 736; *S. v. Gilchrist,* 113 N. C., 673; *S. v. May,* 132 N. C., 1021; *S. v. Gregory,* 153 N. C., 646.

We find no error, and this will be certified.

No error.

STATE v. L. L. WINDER.

(Filed 19 April, 1922.)

1. **Juror — Opinion — Impartial Trial—Courts—Discretion—Appeal and Error.**

   Where on the trial of a criminal case jurors on their *voir dire* have stated they had formed an opinion of the defendant's guilt, but they could lay this aside, hear the evidence, the argument of counsel and the charge of the court, and render a fair and impartial verdict according to the evidence, their serving on the jury is a matter within the discretion of the trial judge, and not reviewable on appeal.

2. **Evidence—Corroborative—Criminal Law—Statutes—Children—Carnal Knowledge.**

   Where the prosecutrix has testified upon the trial for the unlawfully carnally knowing or abusing an innocent female child over twelve and under fourteen years of age (C. S., 4202), her testimony in answer to the questions of the solicitor, to the effect that she had told her mother on the day of the occurrence, who was the only near relative present, is admissible for the purpose of corroborating her other testimony.

3. **Evidence — Witnesses — Cross-Examination — Character—Impeaching Evidence—Criminal Law.**

   It is competent for the solicitor in a criminal action to broadly cross-examine the defendant's witnesses upon their collateral testimony given on their direct examination, tending to discredit the State's witnesses, the limitation ordinarily being that they are not bound to answer questions that might subject them to an indictment or to a penalty under the statute.

4. Appeal and Error—Objections and Exceptions—Instructions—Contentions.

Exceptions to the statement of the contentions made by the trial judge in his charge to the jury, taken for the first time after trial, in the appellant's statement of the case on appeal, afford the trial judge no opportunity for correction, and are not reviewable.

APPEAL by defendant from *Horton, J.,* at November Term, 1921, of PASQUOTANK.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

W. L. Cahoon, Meekins & McMullan, P. G. Sawyer, and Thompson & Wilson for defendant.

WALKER, J. The defendant was convicted at the November Term, 1921, of the Superior Court of Pasquotank County, Horton, J., presiding, of the statutory crime of carnally knowing a female child (Hattie Puckett) under fourteen years of age, and from the judgment upon such conviction, appealed to this Court.

The statute upon which the prosecution was based is C. S., 4209, as follows: "If any person shall unlawfully carnally know or abuse any female child over twelve and under fourteen years old, who has never before had sexual intercourse with any person, he shall be guilty of a felony, and shall be fined or imprisoned in the State's Prison, in the discretion of the court." The State's evidence, if accepted as true, was conclusive of defendant's guilt.

Exception one was to the court's overruling defendant's challenge to, and refusing to stand aside five jurors, who on their *voir dire* stated that they had formed an opinion that the defendant was guilty, but could lay this aside, hear the evidence, the argument of counsel, and the charge of the judge and render a fair and impartial verdict according to the evidence. These were competent jurors. This ruling of the court is fully sustained by many decisions of this Court, presenting the same question. One of the more recent cases is *S. v. Terry,* 173 N. C., 761, in which it substantially appeared that after challenge to a juror, and upon cross-examination, as well as upon examination by the court, the juror testified that he could "eliminate from his mind all that he had heard or read, and that he could go into the jury box and be governed solely by the evidence produced upon the trial, and by the charge of the court, and he could give the State and the prisoner an absolutely fair trial. On examination by the judge, the juror stated again that he could render a verdict uninfluenced by any opinion he may have formed, or anything that he may have heard or read. The court in its discretion found the said jurors to be impartial, and had them tendered and sworn. With reference to this ruling of the court, it was held in that case to be in "exact accord" with previous decisions of this Court, and especially with the very recent case of *S. v. Foster,* 172 N. C., 960, which cites with approval the case of *S. v. Banner,* 149 N. C., 519, in which the same questions were asked and like answers returned as in the case now before this Court. The decision there was that a juror, having been tested according to the standard used in the present case, was a competent juror, and that his admission to the jury box was in the sound discretion of the judge. *S. v. English,* 164 N. C., 498. Like ruling was made at this term upon practically the same state of facts. *S. v. Montgomery, ante,* 747.

Exception two was taken to the solicitor's question, and the answer of the prosecuting witness, Hattie Puckett, as follows: "I told my mother about this occurrence Sunday. Q. Was there any one else in your household for you to tell it to. A. No, sir. I had no sister or brother or father there to tell." This, of course, may have had very little, if any, probative force. It did tend to show that she told it to the only person accessible to her, who would probably be in her confidence, and as such it was admissible as corroborative of her..

Exceptions three, four, and five were to the admission of questions and answers put by the solicitor to adverse witnesses on the cross-examinations. These were admissible as impeaching the witnesses. It is said in *S. v. Davidson,* 67 N. C., 119: "It is now held that you may put almost any question to the witness, and that the witness is bound to answer it, unless the answer might subject him to an indictment, or to a penalty under a statute," which is approved in *S. v. Lawhorn,* 88 N. C., 637, and in *S. v. Robertson,* 166 N. C., 356, at page 360. But there are some exceptions to this rule, though not presented in this case. Those cases should, however, be considered with *S. v. Holly,* 155 N. C., 485, and what was said by *Justice Allen* therein as to collateral testimony upon the question of character.

The argument in this Court for defendant was confined mainly to the question as to the competency of the jurors to sit in the case, and, we think, properly so, but we have carefully examined all the other exceptions of the defendant and find them to be so unimportant, if not trivial, in their nature, as not to justify a reversal of the judgment. There was certainly no more than harmless error, if any error at all, in the rulings of the judge. Several of them were merely explanatory, and admitted in reply to attacks upon the State's witnesses. The State did have, and should have, the right to explain any seemingly wrong imputed to its witnesses. Having allowed the insinuation against their character to be made, or the truth of their testimony impeached, if only in an indirect manner, it was nothing but fair and just that they should be permitted to rebut any implication of wrongdoing against them, or to explain any conduct on their part which was sought to be questioned by the other side so that the jury might hear the whole story and be more competent to pass upon the credibility of the testimony.

Many exceptions were taken to the statement by the judge of the contentions of the State and the defendant, but the judge, in respect to them, made the following finding: "No objection was made during the charge, or after the same, or at any time during the trial, to any statement or contentions by the court, nor was any correction suggested, all exceptions to statement of contentions and charge being made for the first time in the statement of the case on appeal served 13 January, 1922, the case having been tried November, 1921." The other exceptions to the charge are clearly without merit. The instructions to the jury were full and complete, presenting the case to the jury in every phase of it, and correctly stated the law bearing upon all questions raised during the course of the trial.

No error.

STATE v. BUD MURDOCK.

(Filed 19 April, 1922.)

1. **Trials—Attorney and Client—Improper Remarks—Argument.**

A remark of the solicitor in an argument to the jury upon the trial of the defendant for the illicit manufacture of liquor, as to the appearance of the defendant, who had not become a witness, being typical of a blockader, is improper, and when not corrected by the judge when called to his attention, is reversible error.

2. **Same—Instructions.**

Where the solicitor has made remarks to the jury, in his argument before them, to the prejudice of the defendant in a criminal action, the judge may either correct them at the time they have been called to his attention, or afterwards in his charge to the jury.

3. **Same—Appeal and Error.**

Where the solicitor has gone outside of the evidence to make prejudicial remarks about the personal appearance of the prisoner on trial in a criminal action, and the judge, upon having it called to his attention, has stated he would correct it in his charge, his instruction in this case that the jury must confine itself to the evidence and not consider the personal appearance of the prisoner, *is held* sufficient to remove the prejudice, such matters being left largely in the discretion of the trial judge, and it being for the defendant to offer prayers for instructions more full and explicit should he have so desired.

APPEAL by defendant from *Daniels, J.,* at December Term, 1921, of DURHAM.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Brawley & Gantt for defendant.

WALKER, J. The defendant was convicted at the December Term, 1921, of the Superior Court of Durham County, Daniels, J., presiding, of manufacturing liquor, and from the judgment upon such conviction appealed to this Court.

On 23 December, 1920, three officers of Durham County, Belvin, Morgan, and Hall, went into Patterson Township in Durham County and discovered three men manufacturing liquor at a still. The officers went in forty yards of the still, and observed the men for about twenty minutes. All of them recognized the defendant Murdock as one of the operators of the still. The defendant attempted to prove an alibi by two witnesses named Lowe, who were relatives.

One of the alleged errors was a remark made by the solicitor as he was closing his address to the jury, which was as follows: "I do not know when I have seen a more typical blockader. Look at him, his red nose, his red face, his red hair and moustache. They are the sure signs. He has the ear-marks of a blockader." The judge was occupied at the time and did not notice the remark, but the matter having been called to his attention, he stated that he would cure it in his charge, and the record further states as follows: "The judge, in compliance with his intimation to counsel for the defendant and the solicitor, and for the purpose of complying with the objection or exception of defendant's counsel, and removing from the minds of the jury any unfavorable impression which may have been made by the comments of the solicitor, upon the personal appearance of the defendant, charged the jury as follows: The defendant did not go upon the stand to testify in the case. "A statute passed by the Legislature, I think in 1879, gives the defendant the right to testify in his own behalf, in a criminal case. Before that time he had no such right, but that same statute provides that if he does not avail himself of this privilege, the jury is not to consider his failure to testify in any manner to his detriment. Nor are they to consider the physical appearance of the defendant in court, nor any personal peculiarities of him observed by them. You are to pass on the case purely upon the evidence of the witnesses."

The comment of the solicitor upon the personal appearance and characteristics of the defendant was clearly improper, if not a serious breach of his privilege in discussing the case before the jury, but the judge attempted to correct, and, we think, he did correct any wrong or injurious impressions made upon the jury, or we must take it that he did, as abuses of this sort, we have said in many cases, must be left largely to his sound discretion as to the method or manner he will adopt in protecting the rights of the defendant. We held in *S. v. Davenport,* 156 N. C., 596, at 597: "Improper remarks made by counsel to the jury are not reversible error when it appears that the court has instructed the jury not to consider them, but to confine themselves in their consideration to the facts bearing upon the issues; and exception to the instructions not being more specific or full, must be taken by way of prayers for special instruction thereon. The trial judges are cautioned to immediately and fully correct abuses of this character." See, also, *S. v. Tyson,* 133 N. C., 692. It appears that in *S. v. Davenport, supra,* the remark of the solicitor was quite as unjustifiable, and as prejudicial to the defendant, as the invective of the solicitor in this case, and there it was stated: "In his address to the jury, one of the prosecuting attorneys used this language: 'The jury should find the defendants guilty, as their fines will be paid by the Richmond Cedar Works, a foreign corporation with headquarters in Virginia, a foreign state, where its officers sit back with slippered feet and direct this thing to be done.' The defendants objected to these remarks at the time they were made, and the judge fully cautioned the jury, not at that time, but in his charge, to disregard them and to confine their inquiry to the single question as to the forcible entry. We think the caution was sufficient, but if not, the defendants should have requested the judge to make it so. This they did not do," citing *Simmons v. Davenport,* 140 N. C., 407.

The "abuse of privilege" by counsel is not to be regarded as is the language of a judge, which reflects upon a party or a witness. (*S. v. Rogers,* 168 N. C., 112; *Morris v. Kramer,* 182 N. C., 87.) The judge should be permitted, in the former case, to direct the course of the trial, but he should exercise great care to see that no party is improperly subjected to abuse or to unjust criticism; that is, such as is not based upon the evidence. Counsel have no right to state as a fact anything extraneous to the evidence, and which is calculated to unjustly prejudice a party, or to bring him into ridicule or contempt, or to humiliate or degrade him in the minds of the jury and by-standers, but we must leave the remedy for this evil for the judge to apply as in his discretion and good judgment seems to be proper under the circumstances. The judge in this case acted with reasonable promptness, and it was sufficient to defer his reference to the incident until he charged the jury. He told the jury, and cautioned them, in effect, that they should decide the case solely upon the evidence and be governed only by it. He also cautioned the jury that they should not consider the "physical appearance or personal peculiarities of the defendant observed by them." It must have been evident to the jury that he was directing their attention to the improper comments of the solicitor, and it is stated in the record that he gave this instruction in compliance with his promise to defendant's counsel, and to remove any unfavorable impression which had been made upon the jurors by the comments of the solicitor. He might have said more, under the circumstances, but we cannot hold that he was obliged to do so. He might have been convinced, in the presence of the situation, that what he said was quite sufficient for the protection of the defendant. It must not be understood that we approve at all of what was said by the solicitor, we merely trust to the presiding judge to administer the proper corrective, and to see that no wrong is done. He has the discretion to set aside the verdict, and to order a new trial, if he is satisfied that the verdict was the result of prejudice engendered by the severe language of the solicitor, and we must presume that he did not so conclude, as he took no such action.

This is not like *S. v. Evans, ante,* 758, because there the solicitor referred entirely to evidence of facts not in the case, and when the judge had properly cautioned the jury not to consider what the solicitor had said, the latter repeated his remark, and for this reason we ordered a new trial, while in this case there was no repetition by the solicitor after the judge had cautioned the jury to confine themselves strictly to the evidence and not to be influenced by the personal or physical appearance of the defendant. He was manifestly referring to and attempting to remove any wrong or prejudice caused by the solicitor's remarks, although he may not have expressly mentioned them. He could not have intended his instructions to apply to anything else, because what the solicitor had said was the only reference to the defendant's personal appearance.

The other exception is without any merit, as the judge gave to the jury the proper caution, and one which this Court has repeatedly approved.

There is no reversible error in the case.

No error.

STATE v. ERNEST SHEFFIELD.

(Filed 26 April, 1922.)

1. **Intoxicating Liquor—Spirituous Liquor—Unlawful Sales—Evidence—Open Questions for Jury—Possession—Prima Facie Case.**

Upon the trial of defendant for having the unlawful possession of liquor for the illegal purpose of sale, there was evidence that the defendant had one-half gallon thereof in his automobile at the time of his arrest thereat, in two one-quart flasks, and declared that one of them was for himself and the other for a person whom he would not name, and that a search of his house at a previous time did not result in finding liquor therein, but in finding a place where a still had been operated about 150 yards distant. There was also evidence that at the time of the arrest the defendant declared it was not the first time he had had liquor, and that it would not be the last, and threatened injury to any one who had informed on him: *Held*, no *prima facie* case had been made out under the statute, but that all the evidence, when properly considered, was sufficient for an inference that he had the liquor, one quart at least, for the purpose of an illegal sale, upon which the jury could render a verdict of guilty, as upon an open question of fact.

2. **Intoxicating Liquor—Spirituous Liquor—Unlawful Sales—Acting for Another.**

One who participates in effecting the sale of liquor from one person to another is equally guilty of the unlawful sale thereof as the one for whom he was acting.

3. **Appeal and Error—Instructions—Contentions—Arguments—Reply of Judge—Harmless Error.**

Upon this trial of defendant for having liquor in his possession for the purpose of an unlawful sale: *Held*, the recitation of the solicitor's argument upon the waiver by defendant of his right to have the case removed to another justice of the peace for the preliminary hearing, was not to the defendant's prejudice, as the judge immediately and conclusively answered them, and fully protected his rights.

APPEAL by defendant from *Ferguson, J.*, at October Special Term, 1921, of MOORE.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

H. R. Ihrie and H. F. Seawell for defendant.

WALKER, J. The defendant was convicted under an indictment which in a single count charged him with having the illegal possession of whiskey for the purpose of sale, and from the judgment, upon conviction, appealed to this Court.

There was no evidence in the record, except that of the State, and it contends that being capable of two inferences, it was argued upon those inferences and submitted to the jury, who found the defendant guilty. Stated briefly, the State's evidence was as follows: Deputy Sheriff Brown arrested the defendant in the town of Hemp, 1 October, 1921, found a rifle in his automobile, and, under the cushion of the back seat, a half gallon of whiskey in two quart packages. At the time the defendant was arrested he was under bond in another whiskey case. Sheriff Brown immediately carried him before a justice of the peace, and on the way defendant told him there was no use of having a trial, that he would just waive examination. He said that he had got a quart for himself and another quart for somebody else, but refused to tell who the other person was. He further said that the man who reported him had better never tell it or he would fix him and fix him good. The justice of the peace was present when the defendant was arrested, and at the trial told him he could move the case. Thereupon, the defendant replied that he had the liquor, and it was not the first time he had had liquor, and he would have some more pretty soon. The justice of the peace testified that as a revenue officer he had searched defendant's premises a number of times, but found nothing to arrest him for; but he did find where a still had been operated about 150 yards from his house.

This is substantially the State's evidence. At its conclusion defendant demurred to the evidence, and excepted to the judge's overruling the motion to dismiss. The above statement shows evidence sufficient to carry the case to the jury.

The court left it to the jury to determine upon all the evidence whether the defendant had possession of the liquor innocently, or for the purpose of selling, or assisting in selling, it to another. The defendant, upon his own statement, had procured the liquor, one quart for himself and the other quart for the person to whom he was carrying it at the time the officer arrested him. The jury could fairly and reasonably draw the inference, that he had purchased the liquor from some one else for himself and the other person. He did not state that it had been given to him, but said, rather defiantly, in answer to the justice of the peace who had agreed to remove the case from him, that "he had the liquor, and it was not the first time he had had liquor, and that he would have some more pretty soon," and also threatened the man who had reported him, adding that he had better never let him know who it was, for if he did, "he would fix him, and fix him good." The liquor was found in the car, under the cushion of the rear seat. Upon this evidence there was no *prima facie* case that the law had been violated, and the court did not so instruct the jury, but left it to the jury, upon all the evidence, and as an open question of fact, to find whether the defendant had the liquor in his possession for the purpose of unlawfully delivering it, as agent for the seller, to the person for whom, he had testified, it was intended. If he was participating in effecting the sale of the liquor from one person to another he was just as guilty as if he had sold it himself, as the principal, and was not merely aiding a third party to make the sale. *S. v. Burchfield,* 149 N. C., 537, which seems to answer fully all the contentions of the defendant in this respect.

The part of the charge relating to the defendant's waiver of a preliminary examination before a justice of the peace was only the statement of a contention, or argument, by the State, to which the judge gave an immediate and conclusive reply, which fully protected the rights of the defendant, and rendered harmless any reference to the alleged waiver.

No error.

STATE v. B. W. BARKSDALE.

(Filed 26 April, 1922.)

Appeal and Error—Dismissal—Rules of Court.

In this case, *held* that the appeal be dismissed in the Supreme Court on motion of the State for the failure of the appellant to docket his case at the first term of this Court beginning after the trial below, or apply for a *certiorari* upon filing a transcript of the record proper, in accordance with the requirements of the rules of Court regulating such matters.

APPEAL by defendant from *Finley, J.,* at July Criminal Term, 1921, of RICHMOND.

The defendant was convicted of soliciting orders for intoxicating liquors, and appealed. This case was here at Spring Term, 1921 (181 N. C., 621), and on a new trial below in July, 1921, he was again convicted, and appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Gibbons & LeGrand and Travis & Travis for defendant.

PER CURIAM. Though the defendant was convicted and appealed at July Term, 1921, of Richmond, the record was not docketed here, nor was any *certiorari* applied for, upon a filing of the transcript of the record proper on appeal at the fall term of this Court. Indeed, the appeal was not docketed here until 11 April, 1922. The motion of the Attorney-General to dismiss must be allowed. This has been the uniform practice of the Court, as was held in *S. v. Johnson, ante,* 730, where the matter is fully discussed with full citation of authorities.

Indeed, this has been the uniform practice in accordance with the rules of the Court in both civil and criminal cases. Among the more recent cases are *Howard v. Speight,* 180 N. C., 654, citing numerous precedents. At last term the same ruling was reaffirmed in *Buggy Co. v. McLamb,* 182 N. C., 762; *Kerr v. Drake, ibid.,* 765; *Tripp v. Somersett, ibid.,* 768, and *S. v. Satterwhite, ibid.,* 892, in which last case the rule was again reaffirmed with full citation of authorities.

Appeal dismissed.

STATE v. CARL LIPPARD.

(Filed 3 May, 1922.)

1. Criminal Law—Larceny—Stolen Goods—Recent Possession—Presumptions.

For the recent possession of stolen goods to raise the presumption of law that the defendant, upon whom they were found, was the thief, such possession must be so soon after the fact of the theft shown that the defendant could not reasonably have gotten possession of them unless he had stolen them himself, or where the fact of his guilt is self evident from the bare fact of being found in possession of them.

2. Same—Instructions—Burden of Proof—Appeal and Error.

Where the fact of possession of stolen goods is insufficient to raise a presumption of law that defendant upon whom they were found was himself the thief, and he has offered evidence tending to establish his innocence, an instruction that he is presumed, as a matter of law, to be the thief, is reversible error, in placing upon him a greater burden of proof than required of him.

3. Same—Automobiles.

In an action to convict the defendant of the larceny of an automobile, there was evidence on behalf of the State tending to show that two weeks or more after the theft certain parts or accessories of the stolen machine were in the defendant's possession, but that the machine itself was never found, with confusing and contradictory statements of the defendant as to his lawful possession, as well as other evidence of his innocence, an instruction to the jury: *Held* reversible error; that one found in possession of stolen property is presumably the thief, without the necessity of the State to introduce further proof, and that the burden is on the defendant to show his lawful possession of them.

Appeal by defendant from *Ray, J.,* at the August Term, 1922, of Mecklenburg.

Indictment for larceny of a Ford automobile, the property of one C. W. Johnson.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

J. D. McCall, Plummer Stewart, Hamilton C. Jones, Wilson Warlick, and W. A. Self for defendant.

HOKE, J. There were facts in evidence on the part of the State tending to show, among other things, that on 13 June, 1921, the Ford automobile of C. W. Johnson was stolen at the baseball park, in the city of Charlotte, and has never been found or recovered. That some two weeks later the defendant, at the time driving an Essex car, the property of his father, was arrested in the city of Charlotte for speeding, and there was found in the car, covered over with a coat or quilt, a jack, identified as that owned by the prosecutor, and in his car at the time it was stolen. A few days later, at the home of defendant's father, and on a new Ford owned by defendant, there was found a Claxon horn, which was identified by prosecutor as the horn which was on the stolen car at the time it was taken. There were also other inculpating facts, including confused and contradictory statements of defendant as to how he came into possession of these articles. And also much evidence on part of defendant tending to show how he came into possession of these articles, and in a manner consistent with his innocence of the crime charged, etc. In referring to the possession of these articles, identified by the State's evidence as being in or a part of the stolen car, his Honor, among other things, said: "It being a rule of law, gentlemen, that one found in possession of stolen property is presumably the thief—that this is a reasonable presumption of the law that he be the thief, if found in possession of stolen property, and throws the burden upon the defendant to account for his possession." Again, after stating that this is presumption of fact and not of law, shutting off all evidence to the contrary, and that in order to the application of the principle, it must appear that the possession is with the knowledge and concurrence of the defendant, which is correct, the court instructed the jury further that the finding of stolen goods in the possession of the defendant a reasonable time after the theft is committed raises a presumption that he himself is the thief, and it is the law that a person found in possession of goods recently stolen is presumed in law to be the thief, and it is not necessary for the State to show further circumstances tending to prove defendant guilty. And later in the charge, on the subject, the court said: "And again, gentlemen, where a person is found in possession of goods that have been recently stolen, there is a presumption of law that he is guilty of the theft, and it is not necessary, in order to convict him, for the State to show that any other suspicious circumstances accompanied such possession."

The doctrine that there is, or may be, a presumption of guilt from the recent possession of stolen goods is one that, in the language of *Chief Justice Hale,* must at all times "be warily pressed," approved by *Allen, J.,* in *S. v. Ford,* 175 N. C., 797-800, and to our minds, in this instance, has been erroneously applied, to defendant's prejudice. While this presumption, when permissible, is not infrequently designated as a rule of law, it is not so in the strict sense of the term, shutting out all evidence to the contrary, but is one of fact and rebuttable by proper proof, and is rebutted by evidence in explanation which raises a reasonable doubt as to a defendant's guilt. *S. v. Anderson,* 162 N. C., 571. And our decisions hold that in order to its proper application it must be "manifest that the stolen goods have come to the possession by his own act or with his undoubted concurrence, and it must be so recent and under such circumstances as to give reasonable assurance that such possession could not have been obtained unless the holder is himself the thief." *S. v. Ford,* 175 N. C., 797; *S. v. Anderson,* 162 N. C., 571; *S. v. Hullen,* 133 N. C., 656; *S. v. Graves,* 72 N. C., 482; *S. v. Smith,* 24 N. C., 402. In *Ford's case, supra,* also *Justice Allen* delivering the opinion, quotes with approval from *Pearson, C. J.,* in the *Graves case, supra,* to the effect that the presumption does not arise except when the fact of guilt is self-evident from the bare fact of having the stolen goods. And from *S. v. Anderson, supra,* "except when defendant could not have reasonably gotten the possession unless he had stolen them himself." In the case of *S. v. Graves, supra,* it was proved that on 9 August, the home of J. I. Scales, in Greensboro, N. C., was feloniously broken into and a watch and chain stolen. That on 10 August, at Danville, Va., defendant had the watch and chain in his possession, and swapped them off for another, receiving small boot. Defendant, denying his guilt, testified that he got the watch and chain from John and Dennis Sellars on Sunday night, 9 August, who got defendant to take them to Danville and trade them off. There were other facts tending to inculpate defendant. On the trial the Superior Court judge charged the jury that "if defendant was in possession of goods, in Danville on Monday, 10 August, stolen in Greensboro on 9 August, the law presumed he was the thief and had stolen them, the prisoner was bound to explain satisfactorily how he came by them." In holding this to be an erroneous charge, the Court said: "His Honor committed manifest error in taking the case from the jury and ruling that 'if the jury believed from the evidence that the prisoner was in possession of the watch and chain in Danville on the Monday after the watch and chain were stolen on Saturday night in Greensboro, the law presumed he was the thief, and had stolen the watch and chain, and that the prisoner was bound to explain satisfactorily how he came by the goods.' The rule is this: "When goods are stolen, one found in possession so soon thereafter that he could not have reasonably got the possession unless he had stolen them himself, the law presumes he was the thief." And further, the presumption would only arise where the fact of guilty is self-evident from the bare fact of being found in possession of the stolen goods, and otherwise it becomes a case depending on circumstantial evidence to be passed on by the jury. And a like position was upheld in *S. v. Anderson, supra,* where the fact of possession was only held to be an inculpating circumstance with other facts tending to show guilt, and to be considered and passed upon by the jury without any artificial weight arising from a presumption raised by the law. In the present case, defendant was never found in possession of the stolen car, but of a jack and horn which the State's evidence tended to show had been detached from the same and found in defendant's possession two weeks and more after the alleged theft. These and other inculpating facts are sufficient to carry the case to the jury, but the circumstances presented afforded so many opportunities for defendant to have become possessed of these articles in a manner consistent with his innocence that the artificial weight incident to a presumption raised by the law does not obtain, and for the error indicated, defendant is entitled to a new trial of the issue.

New trial.

STATE v. T. H. BROWN AND W. A. L. SMITH.

(Filed 3 May, 1922.)

1. **Intoxicating Liquor—Spirituous Liquor—Evidence—Verdict—Motions —Nonsuit—Trials.**

Held, the evidence in this case of the close relation and conduct of the two defendants indicted for violating the prohibition law, the location of the still on the land of B. and with pathway to his house, his furnishing the wood for the still, found by the officers fired and surrounded with material for the distillation of liquor, and the acts and conduct of S. in relationship to the unlawful act, is upon defendants' motion to nonsuit, sufficient to sustain a verdict of conviction against B. of "guilty of permitting a distillery to be erected on his premises and manufacturing liquor," and against S., of "guilty of manufacturing liquor."

2. **Appeal and Error—Rules of Court—Dismissal.**

A case on appeal will be dismissed in the Supreme Court when the appellant has not conformed to the rule requiring that it be docketed in a certain time before the call of the district, at the first term of the Supreme Court beginning after the trial, and has failed to apply for a *certiorari* on good cause shown.

APPEAL by defendants from *McElroy, J.,* at June Term, 1921, of MECKLENBURG.

The defendants were indicted for violation of the prohibition law.

The defendants excepted for the refusal to nonsuit. The evidence for the State, condensed, tends to show the following facts: That about 10 April, 1921, the deputy sheriff and four officers named, in consequence of information received, went out to a farm owned by the mother of Brown, but under his control and management, and found there a 50-gallon still, two large vats of still beer, and all kinds of barrels, slop vats, funnels, buckets, and everything used in connection with making whiskey. The still was a good one, built on a brick furnace and cased up with brick. They also found a lot of provisions there, such as ham, cheese, coffee, light-bread, and a great number of empty sugar sacks. They found the vats full of beer that was working, about 2,000 or 3,000 gallons. This beer was ready for the still. The still was hot and the fire was burning beneath it. The officers put out the fire by pulling the wood out from under the furnace. The still was about 50 yards from the edge of a meadow, where the defendant Brown was in the habit of cutting hay. At that date, 10 April, the hay had not been cut, but nearby was an old stack place, where the hay the year before had been stacked. Across this meadow and about 100 yards from the still was an old house place. The old house had been torn down and the timbers sawed into wood, and there was a large pile of that wood down at the still. The officers carried some of the wood found at the still up to the old house place and compared with the wood lying there, and found that it was the same and sawed the same length. The chimney of this old house had also been torn down and the brick used at the still appeared to be the same as that remaining in the old chimney at the house.

There was a road to the old house and a well-beaten path led therefrom to the still. The road stopped at the old house place and the path ran from that place to the still and stopped there. The officers found the still by following that path. They found a lantern setting on the wood pile at the old house place. It was black with smoke, had beer slops on it, and had evidently been used at the still. The wood at the still, when compared with that at the house place, was found to be the same size and length, and was sawed in the same way. Deputy Sheriff Festerman went back there a few days later and found the same things there, except that they had been moving the vats out. Most of them had been moved away. He testified further that he saw the defendant Lee Smith drive up in a Ford truck just as he was leaving. "He never said anything to me. He saw us and turned off through an old field. I saw two men in the truck with him, but I don't know who they were. He sorter drove through the old field and stopped. I don't know what had become of the lumber and stuff that had been moved away, but it had been moved. Part of the furnace had been carried out into the old field."

The defendant Brown had had this house torn down about two or three weeks before the still was discovered, and part of the timber sawed up and left there. Two days before the still was discovered, three negro boys saw the defendants Smith and Brown go down to the still. They drove their automobile up to the old house place, then got out of the car, came down the road, turned up the edge of the thicket and went into the still. They stayed there about 5 or 10 minutes, then left. The boys, noticing this, after they left, followed them, found a path, then took the path and went to the still.

Both defendants denied that they knew anything of this still. They admitted that they were at the old house place and had walked down in the meadow at the time that the three boys saw them, but claimed to have gone there to look after the hay of last year's cutting. The defendant Brown testified that his hay yard was about 135 yards from the still, and said: "When I got out of my automobile that day I did not go in the direction of the still place at all; I went in the other direction. . . . We did not go into the thicket at all, and I did not see any path leading to the still until after it was captured." He admitted he had hauled the lumber and some of the slops from the still after the still was cut up, and that he gave his codefendant Smith some of the slops.

The defendant Smith admitted that he got about a quart of liquor which was made at this place, and said: "Some boys found some liquor down there on Tuesday evening and brought it to my house. They took the most of it, at least some one did. I do not know who got the balance. I got less than a quart."

There was some evidence introduced by the defendant in explanation or contradiction of some of the above testimony, but the jury did not give it credence, and found the defendant Brown "guilty of permitting a distillery to be erected on his premises and manufacturing liquor," and Smith they found guilty of manufacturing. Judgment and appeal.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

F. M. Redd and D. B. Smith for defendants.

CLARK, C. J. On this motion for nonsuit, the evidence of the State must be taken as true with the most favorable inferences that the jury was authorized to draw from it. As to the defendant Brown, the evidence was sufficient to be submitted to the jury both on the charge of knowingly permitting land in his possession and under his control to be used as a place for the manufacture of liquor; and also for manufacturing it. He admits that he was in and about this meadow frequently a short time before the still was discovered; that he directed the tearing down of the house and the sawing up of some of its timbers on its site, and was himself in and about the place while this work was going on. The State's evidence established clearly that there was a well-beaten path from this house to the still; that the fire wood used at the still came from the pile admittedly sawed under direction of the defendant; that setting on this pile of wood at the house was a lantern, smoked and beer-besprinkled, which bore traces of having been used at the still; and that the brick used in the furnace came from the chimney of this old house.

In *S. v. Jones,* 175 N. C., 709, *Walker, J.,* for the Court, held that one was guilty of manufacturing if he furnished the still, or the corn, or the coal and wood to make the fire, or any other material used in the manufacture of liquor. A bill similar to the one in this case was passed upon and sustained by the Court at last term by *Hoke, J.,* in *S. v. Mundy,* 182 N. C., 910.

The defendant Smith, according to the evidence, was identified with Brown in the whole affair. He was with him on nearly every occasion where Brown is shown to have appeared at or near the still. Smith shared not only in the beer left at the still, but in the whiskey which had been made there, and was seen by two of the officers under suspicious circumstances, apparently going there to haul off the lumber after the still was cut up.

The evidence was sufficient to submit to the jury, and would have authorized the inference that the parties were at the still that morning before day preparing for the manufacture of whiskey, and made their escape before the officers got there, one of them carrying the lantern to the old house place, but blowing it out and setting it upon a pile of wood after they had reached the open. Upon the evidence, taken as the law requires on a motion of this kind, in its most favorable aspect and with the most favorable inferences which the jury can draw therefrom in favor of the State, we could not say that there was no evidence fit to be submitted to the jury against the defendant Smith, although the evidence is not as full and complete against him as against his codefendant. They were evidently associated, and there was evidence to convict Smith of aiding and abetting and hence guilty of the charge of manufacturing, C. S., 3409, as found by the jury.

We have stated and discussed this case because it was argued before us, which would not have been done if we had been advertent to the fact that this case was tried at June Term, 1921; that the record was not docketed, nor any *certiorari* applied for at the fall term, and a *certiorari* would not have issued unless on good cause shown. Indeed, the appeal bond below was not filed until 11 March, 1922, and the appeal was not docketed here until 6 April, 1922.

Under the always uniform ruling of the Court, the appeal should have been dismissed. This has been often reiterated and several cases have been dismissed at this term accordingly. The reason of the rule and the necessity for its uniform observance was restated as late as last week in *S. v. Barksdale, ante,* 785. The Court will make no discrimination between litigants in the requirements which we have found necessary and have always adhered to.

Appeal dismissed.

STATE v. JOE PASOUR.

(Filed 3 May, 1922.)

1. **Evidence—Nonsuit—Trials—Appeal and Error—Criminal Law—Statutes.**

Defendant's exceptions after he has introduced evidence, to the refusal to nonsuit the State in a criminal action, requires a consideration of the entire evidence on appeal.

2. **Homicide—Murder—Deadly Weapon—Admissions—Implied Malice—Evidence—Nonsuit.**

Where the defendant on trial for homicide admits he fired the fatal shot, malice is implied, and nothing else appearing, the killing constitutes murder in the second degree, placing the burden on defendant to show to the satisfaction of the jury facts and circumstances sufficient to excuse the homicide or to reduce it to manslaughter, and defendant's motion as of nonsuit is properly disallowed.

3. **Homicide—Murder—Evidence.**

Where the brother of the accused on trial for a homicide has testified as to certain "scratches" on the body of the deceased, evidence of the State tending to contradict and impeach him is competent.

4. **Same—Appeal and Error—Unanswered Questions.**

Upon this trial for homicide the indication by the witness of the one of several brothers who had admitted killing their father was competent, and, upon the record, evidence as to any peculiarity of the deceased a short time before being killed was irrelevant and remote, and also not considered on appeal when it is not shown what the proposed answer of the witness would have been to the question asked him.

Appeal by defendant from *Ray, J.,* at the November Special Term, 1921, of Gaston.

The indictment charged the defendant with the murder of Eli Pasour, his father. The State prosecuted only for murder in the second degree or manslaughter. The jury returned a verdict for murder in the second degree, and from the judgment pronounced the defendant appealed.

The defendant admitted that he shot and killed the deceased with a pistol, and introduced evidence tending to show self-defense. Other circumstances relevant to the exceptions are stated in the opinion.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

No counsel for defendant.

ADAMS, J. Both before and after he had introduced evidence, the defendant moved to dismiss the prosecution as in case of nonsuit, and duly excepted to the court's denial of his motion. The exceptions, therefore, require a consideration of the entire evidence. C. S., 4643; *S. v. Killian,* 173 N. C., 792. The defendant admitted that he fired the fatal shot, but testified that he acted in self-defense. The intentional killing of a human being with a deadly weapon implies malice, and, nothing else appearing, constitutes murder in the second degree. When this implication is raised by an admission or proof of the fact of killing the burden is on the defendant to show to the satisfaction of the jury facts and circumstances sufficient to excuse the homicide or to reduce it to manslaughter. *S. v. Capps,* 134 N. C., 627; *S. v. Barrett,* 132 N. C., 1005; *S. v. Quick,* 150 N. C., 820; *S. v. Yates,* 155 N. C., 450; *S. v. Orr,* 175 N. C., 773; *S. v. Brinkley, ante,* 720. For these reasons the defendant's own testimony necessarily forestalled his motion to dismiss the action.

A witness for the State was permitted to testify, over the defendant's objection, concerning statements made by the defendant's brother, Morris Pasour, relative to certain marks or "scratches" on the body of the deceased. The defendant's exception, which was duly entered, is without merit. The evidence was competent in contradiction and impeachment of Morris's preceding testimony. The other exceptions require no discussion. Dr. Wilkins properly indicated the brother that admitted the killing, and evidence as to any peculiarity of the deceased a short time before his death, so far as the record discloses, was irrelevant and remote. Besides, the proposed answer of the witness is not shown.

Upon examination of the exceptions and the record, we find

No error.

STATE v. BOB BENSON.

(Filed 10 May, 1922.)

1. Homicide—Murder—Evidence.

Upon this trial for homicide the evidence of premeditation and deliberation in the defendant's killing the deceased with a deadly weapon, *is held* sufficient to sustain a verdict of murder in the first degree, and no error is found in the trial in the court below.

2. Same — Premeditation and Deliberation — Manslaughter—Justifiable Homicide.

The killing of a human being with malice, and with premeditation and deliberation, constitutes murder in the first degree, the element of premeditation being the thought beforehand for some length of time, however short; and that of deliberation, the execution of the preconceived intent, in cold blood, in furtherance of a fixed design to gratify a feeling of revenge or to accomplish some unlawful purpose, and not under the influence of a violent passion suddenly aroused by some lawful or just cause or legal provocation.

3. Same—Malice.

Murder in the second degree is the unlawful killing of a human being with malice, but without the elements of premeditation and deliberation; and malice is that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse of justification, and will be implied in law by the killing with a deadly weapon.

4. Same—Burden of Proof—Satisfaction of Jury.

The unlawful killing of a human being without either malice, premeditation or deliberation is manslaughter, and where the killing with a deadly weapon is established, the burden is on the defendant to show to the satisfaction of the jury, but neither by the preponderance of the evidence, nor beyond a reasonable doubt, the lack of the elements of malice, or the absence of all elements of crime necessary to establish his justification in taking the life of the deceased.

5. Homicide — Murder — Premeditation and Deliberation — Assault — Threats—Abusive Language.

Language however abusive will not alone reduce the offense of murder to manslaughter, when such does not amount to an actual or threatened assault, but where the deceased has unlawfully assaulted the prisoner against his will, who then killed him in the heat of passion caused by the assault, the act of killing is homicide.

Appeal by defendant from *McElroy, J.,* at November Term, 1921, of Iredell.

Criminal prosecution, tried upon an indictment charging the defendant with murder.

There was evidence on behalf of the State tending to show that J. Robert Dishman, accompanied by Van Benfield, was traveling in a Ford car along a public highway in Iredell County when, late in the afternoon of Sunday, 18 September, 1921, he approached a horse and buggy standing near the edge of the road. The horse was tied to a post, with the buggy angling across the road. At the approach of the automobile the horse suddenly jerked back and that threw one of the buggy wheels out past the middle of the road. The car struck the buggy wheel and broke it as it pushed the buggy out of the way. This seems to have been the only damage done, except the breaking of some pieces of the harness.

Van Benfield testified: "I examined the buggy. Looked over the wheel, and saw it was broke, and I told Mr. Dishman I would crank the car. I started to crank the car to get back in the road to see how bad it was torn up. I started to crank the car and Bob Benson and Jule Cowan come out there. I started to give it a jerk and Benson said to me, 'Don't you crank that car.' I started again, and he run right up over me and said, 'Damn you, don't you crank that car.' Dishman said to me, 'Son, don't crank it,' and I never cranked it. Benson commenced cussing Dishman, told him, damn him, he had torn up his horse and buggy and had him to pay. And he would repeat it several times, and Mr. Dishman said, 'I will pay you. I have done it, and I will pay for it.' Benson said, 'You have tore up my horse and buggy,' and Dishman said to Benson, 'Get Dr. Cruse, and if the horse is hurt I will pay for it.' Dishman told Jule Cowan to go in the house and get the lantern and see how bad it was hurt, and how bad the horse was hurt, and Disman said if anything was hurt he would pay for it. Cowan went to the house to get the lantern. Benson commenced pulling off his coat, a white palm beach coat. He throwed it down in the buggy and he said, 'I will go get the officers, they will assess the damages.' Mr. Dishman said, 'Get the officers.' Said, 'I will pay whatever they assess it,' and he left to go to Mr. Privette's to phone for the officers.

"Benson left. Jule Cowan came back out with the lantern. When Benson left, Dishman said, 'Go get the officers. I will sit on the fender of the machine and wait till you get back.' He sat on the fender of the machine, and when Jule come out with the light he told Jule to sit by him, Benson was gone.' Benson was gone 30 minutes. When Benson came back Mr. Dishman was sitting on the fender of the machine and he said to him, 'Did you get the officers?' And his answer was, 'Damn you, you tore up my horse and buggy, and you have got me to pay.' Mr. Dishman said to him, 'Did you get the officers?' and he said, 'Damn you, you tore up my horse and buggy, and you have got me to pay.' Mr. Dishman said to him, 'Did you get the officers?' and he said, 'Damn you, you tore up my horse and buggy, and you have got me to pay.' Dishman asked him the third time if he got the officers, and he said, 'I ain't telling you, but what I didn't get the officers. Damn you, you tore up my horse and buggy and you got me to pay.' Dishman said to him, 'I could have paid you long ago if you had told me how much it was.' Benson left the road and went in Jule's house. Dishman stayed there at the side of the car. I told Mr. Dishman to get in the car and let's go; there was no reasoning to it. Mr. Dishman got in the car. I just started to crank the car, had given it a half jerk, and there were two shot's fired out at Jule Cowan's house. I just raised up. Mr. Dishman said, 'Crank it, son, he is not going to shoot nobody,' and I just pulled the flood bar. The shots sounded like a 32 rifle, 32 pistol, or 38, wasn't no shot gun, no 22 rifle. I pulled the flood bar and started to crank the car by spinning it, turning it around and around. When the shots were fired, hadn't spun it none yet, but I went to spinning the car around and around and spun it until it catched and started, and when the car started, I raised up and Benson was a-pounding Dishman over the head, and as he was hitting him over the head he said, 'Damn you, I will kill you.' "

It appeared to the witness that the defendant was hitting Dishman with a gun.

The defendant himself told the officer, Fred Claywell, soon after he had been arrested, that he struck deceased with a pine pole, about three feet long. The following is the defendant's account of the killing, as related to the officer:

"He said he left his horse and buggy standing beside the road at Jule Cowan's. Said that Mr. Dishman and Mr. Benfield came along and they struck his buggy. Said that he went out and he asked Mr. Dishman what made him run into his buggy, and Mr. Dishman said, 'I didn't see your buggy until I was right against it.' Said, 'I didn't have time to stop.' He said, Mr. Dishman said, 'Your buggy was in the edge of the road, anyhow,' and Bob said he said to him, 'You have got me to pay, Mr. Dishman,' and he said he said, 'All right. I will pay you.' Says, 'I will pay you whatever the damages is.' And he told him, he said, 'You have got to pay me and pay me right now.' He said he said, 'All right, I will pay you whatever the damage is, or you can go get a new wheel and I will pay for it, just whichever you had rather,' and Bob said to him, said, 'Damn you, I will go get the officers,' and Mr. Dishman said, 'All right, go get the officers, and I will stay right here until they come, and I will pay the damages, whatever they say it is.' And he went to Mr. Privette's, and he could not get Statesville, the line was out of order, and he said that he went back and he said, 'I went back with the intention of knocking hell out of him or making him pay for my buggy.' And he said that when he got back to the car he told Mr. Dishman, 'Damn you, you are going to pay me and pay me right now,' and he said, 'Did you get the officers?' and he said that Mr. Dishman said, 'Well, I will pay you whatever it is.' And he says, 'You are going to pay me or I am going to knock hell out of you.' Said he walked down to the lower side of the house and picked up a pine pole three or three and one-half feet long. He said he went back to the car and said, 'I just rapped him in the head.' He said, 'I hit him a hell of a lick the first time with both hands.'"

Dr. Davis testified that he examined the deceased at the hospital and his skull was mashed just like an egg shell.

The defendant introduced no evidence, but asked the court to instruct the jury to return a verdict of murder in the second degree. This instruction was declined, and is the basis upon which the defendant predicates his appeal.

The jury found the defendant guilty of murder in the first degree, and from the sentence of death pronounced thereon, this appeal is prosecuted.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

No counsel contra.

STACY, J. The prisoner has had a fair trial. He has been convicted of murder in the first degree, and rightly so. His conduct was heartless and cruel. The deceased was unusually patient, and at no time was his manner threatening. On the contrary, again and again he reiterated that he was willing to pay the defendant for any damage he had sustained. There was abundant evidence to support the verdict.

His Honor charged the jury fully upon every aspect of the case, and explained clearly the difference between the three degrees of an unlawful homicide, to wit: murder in the first degree, murder in the second degree and manslaughter.

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. *S. v. Thomas,* 118 N. C., 1118.

Premeditation means "thought of beforehand" for some length of time, however short. *S. v. McClure,* 166 N. C., 328.

Deliberation means that the act is done in a cool state of the blood. It does not mean brooding over it or reflecting upon it for a week, a day, or an hour, or any other appreciable length of time, but it means an intention to kill, executed by the defendant in a cool state of the blood, in furtherance of a fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose, and not under the influence of a violent passion, suddenly aroused by some lawful or just cause or legal provocation. *S. v. Coffey,* 174 N. C., 814. When we say the killing must be accompanied by premeditation and deliberation, it is meant that there must be a fixed purpose to kill, which precedes the act of killing, for some time, however short, although the manner and length of time in which the purpose is formed is not very material. *S. v. Walker,* 173 N. C., 780.

Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation. *S. v. Lipscomb,* 134 N. C., 695; *S. v. Fuller,* 114 N. C., 885.

Malice is not only hatred, ill-will, or spite, as it is ordinarily understood—to be sure that is malice—but it also means that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification. *S. v. Banks,* 143 N. C., 652. It may be shown by evidence of hatred, ill-will, or dislike, and it is implied in law from the killing with a deadly weapon; and a pistol or a gun is a deadly weapon. *S. v. Lane,* 166 N. C., 333.

Manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation. *S. v. Baldwin,* 152 N. C., 822.

Manslaughter plus malice gives us murder in the second degree; and murder in the second degree plus premeditation and deliberation gives us murder in the first degree. *S. v. Banks,* 143 N. C., 652.

When it is admitted or proven that the defendant killed the deceased with a deadly weapon, the law raises two presumptions against him: first, that the killing was unlawful; and second, that it was done with malice; and an unlawful killing with malice is murder in the second degree. *S. v. Fowler,* 151 N. C., 732.

The law then casts upon the defendant the burden of proving to the satisfaction of the jury—not by the greater weight of the evidence nor beyond a reasonable doubt—but simply to the satisfaction of the jury *(S. v. Carland,* 90 N. C., 675), the legal provocation that will rob the crime of malice and thus reduce it to manslaughter, or that will excuse it altogether upon the grounds of self-defense, accident, or misadventure. *S. v. Little,* 178 N. C., 722.

The legal provocation which will reduce murder in the second degree to manslaughter must be more than words; as language, however abusive, neither excuses nor mitigates the killing, and the law does not recognize circumstances as a legal provocation which in themselves do not amount to an actual or threatened assault. 13 R. C. L., 795. If, however, the deceased assaulted the prisoner; that is, if he laid his hands upon him against his will, or struck him, or choked him, and the prisoner killed the deceased in the heat of passion, caused by the assault, and not from premeditation and deliberation, and not from malice, he would not be guilty of more than the crime of manslaughter.

There is no error appearing on the instant record, and the judgment must be affirmed.

No error.

STATE v. MARYLAND PUGH.

(Filed 10 May, 1922.)

1. **Evidence—Witnesses—Character—Instructions.**

Where the character of a witness had not been impeached either by contradictory evidence or the manner of his cross-examination, it is presumed to be good, and the testimony of other witnesses thereto will be excluded; and where in a criminal action the case has been given to the jury, who return to court with a request for a further instruction as to whether a witness's character is considered good until proven bad in court, the judge's reply that it is presumed to be good until the contrary is shown, is free from error under the circumstances.

2. **Instructions—Courts—Expression of Opinion—Statutes.**

Where the jury has failed to that time to agree upon a verdict in a criminal action, an instruction by the judge that in effect it was a matter of indifference to him, but it was their duty to agree if they could do so without violence to their consciences; that they must find for conviction beyond a reasonable doubt, uninfluenced by prejudices, etc.: *Held,* not to be an expression of opinion by the judge upon the evidence, contrary to the statute. C. S., 564.

3. **Courts—Evidence—Expression of Opinion—Common Law—Right—Strict Construction.**

Our statute (C. S., 564), forbidding the expression of an opinion by the trial judge upon the evidence, is in derogation of the common-law rule, and its meaning will not be extended beyond its terms.

4. **Same—Criminal Law—Conduct of Jury—Discharge of Jury—Instructions—Remarks.**

Where the trial judge has stated to a jury after rendering a verdict in a criminal action, that from their verdict their attention was evidently attracted by important business matters at home, and therefore he would excuse them for the term, was a matter within his discretion and cannot be construed to the prejudice of a defendant in a later trial, though one of the same jurors sat upon his case, or as an expression of opinion forbidden by C. S., 564.

5. **Appeal and Error—Presumptions—Discharge of Jury—Conduct of Jurors—Remarks—Instructions.**

The remarks of the trial judge in discharging a jury after verdict, or in impressing upon jurors and the public the duty of jurors in their conduct, are *prima facie* presumed on appeal to be correct.

APPEAL by defendant from *Brock, J.*, at April Term, 1922, of RANDOLPH.

The defendant was convicted of an attempt to burn an unoccupied dwelling, and from the judgment upon conviction appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

C. N. Cox and Brittain, Brittain & Brittain for defendant.

CLARK, C. J. The only errors assigned are for matters occurring after the case had been submitted to the jury. There were no exceptions to the evidence or charge.

After the jury had been in deliberation for some time they came into court for further instructions and asked the judge this question: "Is a witness's character considered good until proven bad in court," to which the court replied: "The witness's character is presumed to be good until the contrary is shown." This reply is undoubtedly correct. A witness's character is subject to attack as soon as he goes on the stand. If the opposite party wishes to attack it he may do so by witnesses or by the manner of his cross-examination. If this is not done, and there is nothing in the witness's own testimony which impeaches him, it may well be taken that his character is to be considered good.

In 40 Cyc., 2552 *et seq.*, the authorities are summed up from the different states and hold that: "A witness is presumed to speak the truth, but such presumption is of course subject to be overcome by any other matters tending to indicate that the witness is not worthy of credit, and ceases where it appears that the witness has testified falsely as to a material matter." Also, "As a general rule, evidence is not admissible to sustain the credibility of a witness who has not been impeached and where a witness has not been impeached, it is not permissible to support his testimony by other evidence which, although corroborative in its nature, bears on the credibility of the witness rather than on the issues in the cause." Further it is held that "evidence is not admissible to show the good character or reputation for truth and veracity of a witness whose character has not been attacked and where a witness has not been impeached it is not permissible to support his testimony by showing that he had made statements out of court in conformity to his testimony, or that his testimony is consistent to that given by him in a previous proceeding; or that he had never made any statements contradictory to his testimony. But it is of course permissible to corroborate an unimpeached witness as to any fact in issue in the case."

The ground of all these decisions is that the character of a witness is to be deemed good unless it is impeached. It may be impeached either by direct testimony as to his character or by the manner of his examination, and in such cases the court will admit testimony in support of his good character, but it would be a useless consumption of time to put in testimony as to the good character of a witness which has not been impeached in any way.

In *S. v. Knotts,* 168 N. C., 190, the Court held that it was not error to refuse an instruction that the law presumed defendants were men of good character. While a defendant is presumed innocent of the particular charge for which he is being tried, there is no presumption as to his good character, and the mere fact that he is indicted and on trial is an attack upon his character when offered as a witness, as well as the fact that he is an interested witness.

The jury, having again returned to the court room without having reached a verdict, and having informed the court that it stood 11 to 1, the court then said to them: "The court does not know which way the 11 stand, or who you are, or how the one stands, or who he is, and it does not concern the court to know, but the court instructs you that each of the jurors must be satisfied beyond a reasonable doubt before they can convict the defendant; and it is the duty of the jury, if you can do so without doing violence to your conscience, to reach a decision. The case is one of importance to the State and to the defendant, and some jury must pass upon it."

This is unexceptionable. "The court also suggested that it was the duty of the juror, if he could make up his mind to a moral certainty, to do so, and told the jury to go back and see if they could get together. The court, during the course of its remarks to the jury, stated to the jury that it was their duty to consider the evidence and not to decline to agree on account of stubbornness, that to decline to agree, if one could do so without doing violence to his conscience, was not necessarily a mark of great intelligence or high citizenship." In this we can see nothing prejudicial of which the defendant can complain.

The defendant and his counsel were in court at the time the foregoing remarks were made to the jury, and they made no objection and did not make any exception at the time.

After the verdict was rendered the defendant entered an exception on the following ground: "On Tuesday morning previous, when a former jury was trying a different case, *S. v. Sizemore*, and returned a verdict of not guilty, the court stated to that jury, there being present some who subsequently served as jurors in this case, as follows: 'Gentlemen, you evidently have important business matters at home that are attracting your attention, judging by the verdict which you have just returned, and in view of that fact the court will excuse you for the term.' " This was in the discretion of the trial judge, and he had the power, and it was his duty in a proper case to discharge a jury from service. His remarks are not shown to have been improper, and the presumption of law is that the judge acted properly. Certainly it was no expression of opinion by him on the facts in issue in this case, under our statute which forbids a judge to give an opinion. It is no violation of the Act of 1796, now C. S., 564, which provides: "No judge, in giving a charge to a petty jury, either in a civil or criminal action, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury."

The judge in discharging the former jury, or in making any remarks during the term in the discharge of his duty to impress the public with the duty of jurors in their conduct, is presumed to have acted correctly, and his remarks in so doing can in no possible view be taken as a violation of this statute which forbids the judge to express an opinion "whether a fact is fully or sufficiently proven" in this trial.

This matter has been recently reviewed in *S. v. Baldwin,* 178 N. C., 687, where on the conviction of a party of having in possession spirituous liquors, the judge in sentencing the prisoner expressed condemnation of the transaction, and subsequently at the same term the brother of that defendant was tried for connection with the same offense, and the same objection was made as in this case, and the court said that the judge's remarks could not be considered as an expression of an opinion on the trial of this defendant any more than the verdict of guilty against his brother on whom he was passing sentence had been, and added: "At common law, and in England to this day, the judge is not forbidden to express an opinion upon the facts of any case, but it was deemed that the judge, who is an integral part of the trial, could be of aid to the jury in expressing an opinion upon reasonable inferences to be drawn, from the evidence, though of course he could not direct a verdict when there was conflicting evidence. The same rule still obtains in all the Federal courts and the courts of nearly every State in the Union. It is, therefore, not an inherent right of a defendant that the judge should be restricted from expressing any opinion during the trial."

It was further said that our statute of 1796, now C. S., 564, forbids a judge only "in giving a charge to the petty jury from giving an opinion whether a fact is fully or sufficiently proven. Being in derogation of the common law and of the practice and procedure in the English and Federal courts, and of the procedure generally elsewhere, we cannot extend it beyond its terms," citing many cases to the same effect. The subject is so fully discussed in that case that repetition is unnecessary.

Furthermore the exception was not to anything that occurred during the trial, and presents no question for consideration in this case. There is nothing which would authorize us to say that there was such misconduct of the judge at that term as would vitiate this, or any other trial at that term.

The judge is presumed to have acted properly in his discharge of the jury in the former case, which was a matter committed to his discretion, and certainly is not to be reviewed in this case. If it had vitiated this trial it would have vitiated every other trial at that term.

No error.

STATE v. W. C. KROUT.

(Filed 17 May, 1922.)

Evidence—Criminal Law—Forgery—Corroboration—Appeal and Error—Prejudice—New Trials.

The defendant upon a trial for forgery offered evidence that he was a traveling salesman, and at the time and place charged was in another town, some five hundred miles distant, and in corroboration of his own and of that of others of his witnesses, offered as evidence an order signed by a customer at the latter place, and also testimony of his landlady there that the defendant and his wife had lodged at her hotel, identifying several checks he had given for their board. The court excluded the evidence as to the order for merchandise and testimony of the defendant's witness as to the date and the period of time for which the checks were given: *Held*, the evidence rejected was competent as tending to prove a pertinent circumstance in corroboration of defendant's testimony, and that of his other witnesses, and its exclusion by the court was reversible error.

APPEAL by defendant from *Finley, J.*, at January Term, 1922, of GASTON.

Criminal prosecution tried upon an indictment charging the defendant with forgery.

There was evidence on behalf of the State tending to show that the defendant had obtained the sum of $626.70 from two banks in Gastonia by uttering and publishing certain false, fraudulent and forged checks.

The defendant offered evidence tending to show that he was in the State of Alabama at the time of the alleged offense. His evidence, if believed, was sufficient to establish an alibi.

From an adverse verdict and a judgment of ten years in the State's prison the defendant appealed, assigning errors.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Porter & Mebane, Carpenter & Carpenter, and Bivens & Wilkins for defendant.

STACY, J. The State's evidence, if believed, showed conclusively that the defendant was the person who committed the crime for which he was being tried. Conversely, the defendant's evidence, if believed, established conclusively an alibi on behalf of the defendant. The jury were at liberty to accept either view of the evidence. The controlling issue, upon the trial, was the identity of the person who uttered the forged checks.

The defendant prosecutes this appeal, assigning as error his Honor's refusal to admit certain material and competent evidence, and contends but for the exclusion of this evidence the jury would have returned a verdict of acquittal.

The evidence of the State was to the effect that the forgery was committed in Gastonia, N. C., on the morning of 29 November, 1921. The defendant, who was a traveling salesman, testified that he was not in Gastonia at this time, but that he was approximately five hundred miles away in Gadsden, Ala. In corroboration of this testimony he offered to show, by introducing the original written order, that he had taken an order for the purchase of a "money weight" scale from one J. J. Cook in Gadsden, Ala., on the afternoon of 28 November, 1921. He testified that the said order was signed in his presence and witnessed by him on that date. The order, upon objection, was excluded.

There was also evidence tending to show that the defendant and his wife took their meals at the Mallard Hotel, in Gadsden, Ala., from 7 November to 9 December, 1921. Mrs. O. L. Lewis, the proprietress of said hotel, testified that both were there on the 28th and 29th of November, 1921, and she identified three checks which had been given to her for their board; but, upon objection, she was not permitted to state when they were given nor for what period of time each was intended to cover. In fact she was not allowed to make any explanation at all in regard to them. The defendant then offered the checks as corroborative evidence and they were excluded.

The defendant further testified that on the morning of 29 November he went to the office of the Southern Express Company in Gadsden, received a package from the agent, signed for it on the regular delivery sheet, and this was admitted in support of his testimony as corroborative evidence.

Defendant contends that his Honor's refusal to allow him to corroborate his testimony by showing the original order, signed by Cook on the evening of 28 November was materially prejudicial to the complete establishment of his alibi. He also contends that Mrs. Lewis should have been permitted to testify in regard to the checks given to her for the board of himself and his wife. We think this evidence was competent, and tended to prove a pertinent circumstance in corroboration of the defendant's testimony. *Johnson v. Ins. Co.,* 172 N. C., 148. Not only was it in support of what the defendant himself had said, but it was also material as bearing upon, and in corroboration of, the circumstances and details related by other witnesses. The entire defense was being controverted by the State. Under such conditions considerable latitude must necessarily be allowed in the admission of corroborative evidence. 40 Cyc., 2785, and cases collected in note. Indeed, in 40 Cyc., 2790, it is said that the "corroboration of a witness on one point may render his testimony more credible on points as to which he is not corroborated." And speaking to the question of corroborative evidence in *S. v. Morton,* 107 N. C., 890, *Merrimon, C. J.,* observed: "The evidence tended to strengthen what the impeached witness said, and to increase the probability that it was true. . . . It had some relevancy and point, taken in connection with other evidence, and it was the province of the jury to determine its weight and force," citing *S. v. Green,* 92 N. C., 779; *S. v. Whitfield, ibid.,* 831; *S. v. Freeman,* 100 N. C., 429.

For the error, as indicated, we think a new trial must be awarded, and it is so ordered.

New trial.

STATE v. PEARL HALL AND GARLAND HANEY.

(Filed 2 June, 1922.)

1. **Homicide — Murder — Criminal Law — Evidence — Drinking — Self-defense.**

On a trial for homicide there was evidence tending to show that the defendants concealed liquor they were carrying in a sack on seeing the sheriff and his posse approaching along the highway, and that the sheriff and one of his posse were killed by a pistol shot as he was trying to identify the defendants as others for whom he had a warrant of arrest: *Held,* evidence of the reckless conduct of the prisoners in the presence of a woman and her child at the home of the deceased member of the posse after the killing, was competent under the facts of this case to show the defendants had been drinking and were in a reckless humor.

2. **Homicide—Murder—Evidence—Self-defense.**

Held, on the evidence, it was competent for the State to show the number of pistol shots heard at the time, in connection with the number of empty shells found in the defendant's pistol, upon the question whether the prisoner fired in self-defense upon being arrested by the deputy sheriff.

3. **Homicide—Murder—Sheriffs—Arrest—Warrant—Evidence.**

Where in a trial for homicide there is evidence tending to show that the sheriff was unlawfully killed in arresting the defendant, while endeavoring to identify him as the one for whom he had a warrant, it is competent for the State to show that the sheriff had the warrant at the time, upon the question of his *bona fides* in so acting.

4. **Homicide—Murder—Evidence—Intoxication.**

Where a deputy sheriff has been killed by the defendant while making an arrest to find out whether he was the one for whom the officer had a warrant, evidence that the defendant had a quantity of whiskey in a sack, which he tried to hide upon seeing the officer, and as to the witness finding the sack afterwards, is material evidence, when it tends to explain the subsequent conduct of the defendant in committing the homicide.

5. Criminal Law—Homicide—Resisting Arrest—Evidence—Dying Declarations—Res Gestæ.

Where there is evidence that a deputy sheriff was killed while arresting the prisoner in seeking to identify him as the one for whom he had a warrant of arrest, the dying declaration of the officer that he had been killed while trying to do his duty, is competent as a part of the *res gestæ.*

6. Same—Court's Discretion—Reopening Case.

After the State has rested its case on a trial for a homicide, it is within the discretion of the trial judge to reopen the case and permit the defendant to offer evidence of the dying declarations of the deceased, and his refusal is not reviewable on appeal.

7. Homicide—Murder—Evidence—Dying Declarations.

A written statement purporting to be a dying declaration, must be shown to have been those uttered by the deceased, by competent testimony and under conditions that will cause them to come within the principles upon which testimony of this character is permissible.

8. Same—Appeal and Error—Harmless Error.

The refusal of the trial judge to permit the introduction of dying declarations in a trial for homicide is not reversible error when the evidence rejected does not contradict or vary testimony of this character introduced by the State.

9. Instructions—Correct as a Whole—Appeal and Error—Criminal Law—Reasonable Doubt.

A part of a charge on a trial for a homicide is not erroneous upon the principle of a reasonable doubt when, if taken in connection with what follows, the charge correctly states the law.

10. Appeal and Error—Instructions—Verdict—Criminal Law—Homicide.

Upon a trial for homicide, an instruction upon murder in the second degree, if erroneous, is cured by a verdict of manslaughter.

11. Arrest—Criminal Law—Homicide—Warrants—Identity of Defendant—Resisting Arrest—Justification of Prisoner.

Where a sheriff has a warrant of arrest for persons unknown to him, he may in good faith inquire of persons whom he may meet as to their identity with the names in the warrant, and they are required to answer; and upon failure to give this information the persons suspected or questioned may not upon their own default therein justify the defense of an unlawful arrest.

12. Arrest — Criminal Law—Homicide—Instructions—Resisting Arrest—Appeal and Error.

Where a sheriff is within his powers in making inquiries of defendants and arresting them for the purpose of identifying them as the ones for whom he holds a warrant, an instruction that the defendants had the right to use such force as reasonably appeared to them to be necessary in resisting an unlawful arrest, is favorable to the defendant, and is not a valid ground of exception.

13. Judgments—Arrest of Judgment—Criminal Law—Homicide—Verdict—Appeal and Error.

Where there is evidence tending to show that on the trial for homicide the two defendants acted together, as a part of a common purpose, in killing a sheriff and one of his posse in making an arrest, an instruction that if one of them should be found guilty of manslaughter, the other should be acquitted, is erroneous; and where the judge upon the mistaken application of this principle, arrests the judgment as to one upon a verdict of guilty as to both, the case will be remanded on appeal that a judgment against both may be entered, upon the verdict.

14. Judgment—Arrest of Judgment—Verdict — Appeal and Error — Procedure.

Where after verdict in a criminal action the trial judge has erroneously arrested the judgment and discharged the defendant, on appeal the judgment in arrest will be set aside and a writ will be ordered to issue from the Superior Court that the defendant be brought before the next term thereof for sentence upon the verdict. The procedure as to the defendant's rearrest and right of bail is given in such cases.

15. Appeal and Error—Criminal Law—Judgment—Arrest of Judgment—State's Right of Appeal—Statutes.

Where as a matter of law judgment in a criminal action has been given for defendant upon arrest of judgment in the Superior Court, an appeal will lie to the Supreme Court in behalf of the State. C. S., 4649 (4).

STACY, J., dissents.

APPEAL by defendant Hall from *Ray, J.*, at January Term, 1922, of CHEROKEE; and appeal by the State from arrest of judgment as to Garland Haney.

When the case was called, the solicitor announced that he did not ask for a verdict of guilty for murder in the first degree. The judge charged the jury upon the facts as to both defendants, and further told them that if they convicted Hall of manslaughter, their verdict as to Haney should be not guilty, as Haney could not aid or abet Hall in the commission of a crime committed upon heat of passion. The jury, however, disregarded this instruction, and convicted both defendants of manslaughter. Upon the coming in of the verdict the court arrested the judgment as to Haney and discharged him. From this judgment the State appealed. From the verdict of guilty of manslaughter the defendant Hall appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Fred Christopher, J. N. Moody, and Bourne, Parker & Jones for defendants.

CLARK, C. J. In the evidence of the State it appeared that the defendants Hall and Haney, on 18 August, 1921, were returning on foot from Georgia, both of them drinking, and Hall carrying on his back a tow sack containing a gallon of whiskey, and a jug and a fruit jar with about a quart in it. The deceased, Allen Dean, was a deputy sheriff of Cherokee, and had in his possession a warrant for the arrest of Jack Hall and Lester Mann. Receiving information on the night of the 18th that the defendants, Pearl Hall and Garland Haney, were coming along the road in his neighborhood, and having reason to believe that they were Jack Hall and Lester Mann named in the warrant in his possession, he summoned Charles Watson and B. L. Fox to assist him in making the arrest, and went out on the road along which they were informed the defendants were coming. It was a clear night, the moon shining brightly. Fox was taken along, as he was the only one among the posse who knew Jack Hall and Lester Mann and could identify them if they were the defendants named in the warrant.

About 9 o'clock that night the officers saw the two men coming up the road about 80 yards off. The defendants also saw the officers coming. Hall stopped as soon as he saw them and dropped the bag containing the whiskey alongside the road, while Haney continued to walk forward towards the officers. Hall, after dropping his bag, also advanced along the road about 15 yards behind Haney. Haney first met Deputy Sheriff Dean and his posse, and Watson and Fox stopped with him while Deputy Sheriff Dean went on to meet Hall.

The testimony of the witness Fox as to what occurred between Watson and Fox on one side, and Haney on the other, is in substance as follows: As Haney attempted to pass between them, the witness and Haney both stopped and each turned facing the other. Watson was just behind the witness and advanced further, which threw Watson to the left of Haney. Witness said "Hello" to Haney, who replied something back which witness did not exactly understand, and witness then said, "Who is this?" Haney not replying, the witness leaned forward to see if he could recognize him as either of the men that the deputy sheriff had a warrant for. He saw that it was not them, and stepped back. As he did so he saw a pistol in Haney's hand down by his right side, and Haney put his hand behind him (Haney), and his arm seemed to go under his coat, and at just that instant Watson took hold of Haney's left shoulder with his left hand, and about that time witness saw a pistol in Watson's hand presented towards Haney's hip, and Watson said, "Consider yourself under arrest." Just as he said that Haney turned towards Watson and fired two shots. One of them hit witness. Watson fired the third shot. When this was fired two other shots were fired in succession. These two were fired by Haney into Watson, who was killed almost instantly. The witness Fox was severely wounded by Haney.

There were no witnesses present at the killing of Dean by Hall, who was a little further along the road. Dean was not killed outright, but was mortally wounded, and died about 1 p. m. on the 20th. The dying declaration of Dean as to what occurred is substantially as follows: Dean having reasonable grounds to believe that Pearl Hall was the Jack Hall named in the warrant, which he had for his arrest, arrested Pearl to hold him until Fox could identify him. After Pearl Hall had surrendered his pistol to Dean the shooting by Haney commenced. Pearl Hall, knowing that he was breaking the law by having in his possession so large a quantity of whiskey, and knowing from the shots that Haney was arrested, wrenched Dean's pistol from his hands and shot him. Pearl Hall told Bob Henry that some voice holloaed from the upper group and said "Shoot him." After the shooting the defendant Hall made his escape to Texas, where he was arrested and brought back.

There are numerous exceptions, the first four being to the conduct and words of the defendants as they were passing the house of the deceased Charles Watson, between sundown and dark on the afternoon of 18 August. This evidence was admissible as showing the condition of the defendants at that time; that they were drinking so much as to be reckless in what they said in the immediate presence of a woman and her little girl. The evidence as to the firing of a shot and holloaing at the bridge was also competent as bearing upon the number of shells in the pistol of the defendant Pearl Hall, which was left in the possession of Dean after he had been shot.

The defendant Hall in his testimony claimed that Dean had shot at him. The State contends that the shot through the clothes of Pearl Hall was made by himself to create evidence to support his statement.

Exceptions 8 to 13, inclusive, were to the admission of testimony in regard to the warrant which Dean had for the arrest of Jack Hall and Lester Mann. This was competent and material evidence in the case.

Exceptions 14 to 18, inclusive, were to the evidence by the witness Fox as to his finding the tow sack where the defendant Hall had thrown it, and also as to its contents. This was also material evidence which explained the conduct of the defendants. Indeed the fact that the sack was thrown there by Hall and its contents were admitted by Hall.

Exception 20 is to the dying declaration made by Dean to the witness Allen Davidson, "I just only spoke to him and asked him if he knew who I was, and I said, 'I am sorry to see you in the fix you are,' and he said 'Yes, I was trying to do my duty,' and said 'I could have shot them, but I did not want to do that.'" The defendants object to the remark that he was trying to do his duty, and ask that it be stricken from the record. The court properly overruled the objection. The declarant was an officer in the discharge of his duty, and this declaration was evidence as to the *res gestæ* of the transaction in which his death occurred. *S. v. Mace,* 118 N. C., 1244. His statement is an essential feature of the occurrence tending to show the truth of what happened, and it was proper for the jury to consider it.

After the defendants had rested their case, the State had introduced rebuttal evidence when the defendants offered in evidence a paper that purported to be the dying declaration of Dean, without identifying it in any way. The court excluded this, saying, "After the State had rested its case, the defendants moved to put in written statements as to the dying declarations of the deceased Dean, no evidence having been introduced in regard to it. The court in its discretion refused to allow the case to be reopened, and for the further reason that the paper was taken at the inquest of one Charlie Watson." It was also properly rejected because the alleged written statement of Dean did not tend to contradict any evidence for the State, and merely corroborated, if it had been duly proven, the evidence already introduced by the State that the warrant which Dean had was for Jack Hall and Lester Mann, and that when Dean approached the defendants, asked their names, and they denied that they were the parties he wanted, he found that they had pistols in their hands, and when he demanded their arrest both began shooting; the smaller man shot Charles Watson and Ben Fox, and the larger man shot him; that he was endeavoring to ascertain if they were the men he had papers for.

Exception 23 is to a part of the charge which is correct when read in connection with what immediately follows it. Exception 24 was to the definition of reasonable doubt which, in connection with what immediately followed, was correct. Exception 25 is to a statement of the contention of the State.

Exception 26 is to the charge as follows: "If the State has satisfied you beyond a reasonable doubt that it happened in the way the State contends, that he killed Dean, as the State contends from the declarations of Dean that he did, and you have no reasonable doubt of the truth of this contention, then the law presumes malice from the use of the deadly weapon, and it will be your duty to return a verdict of murder in the second degree as against him." If there had been any error in this charge it has been eliminated by the verdict of the jury.

Exception 27 is to the charge as follows as to the duties and authority of an officer having a warrant for the arrest: "If you find as a fact that Dean was an officer, making an arrest, exercising the function of deputy sheriff—an officer has a right to make an arrest and to inquire of any citizen that he may meet if he is the person named in the process he has in possession, provided he uses good faith in making the inquiry, and the citizen has no right to mislead him or refuse to furnish him proper information upon the inquiry—and then when the officer by reason of failure to secure information upon his inquiry, which he made as an officer, as to a matter he had a right to inquire about, then the party so charged could not justify the defense of an unlawful arrest unless without fault himself." This charge was based upon the theory of the State set out in the record that Dean had reasonable grounds to believe that Hall was the Hall named in the warrant, and that Dean was holding him until Fox could come up and identify him. In this light the charge was correct. *S. v. Dunning,* 177 N. C., 559.

Exception 28 was to a part of the charge which was favorable to the defendant. The court said, "If you find the truth to be as the defendants asked you to find, that Dean asked the defendant who he was, and that he did not fit the description in the warrant, if he possessed this warrant, and that the deceased continued to put him under arrest—the court charges you that there is no evidence, as he sees it up to this time, which would warrant an arrest for an offense committed in the presence of the officer, and the defendant had a right to resist such arrest with such force as would reasonably appear necessary to him for that purpose. And you are the judges of the amount of force reasonably necessary as the facts appear to you when surrounded by the circumstances under which he was surrounded whether or not he used more force than necessary to avoid arrest, if you find he was being arrested unlawfully." This charge was favorable to the defendant. Exception 29 was to a statement of the contention of the State.

Upon a careful review of all the exceptions we find no error of which either of the defendants had a right to complain.

The court charged the jury that "the acquittal of the defendant Hall will carry with it the acquittal of the defendant Haney," and further charged the jury, "If you return a general verdict of guilty, it would encompass the defendant Hall, as charged in the bill of indictment, less the *nol. pros.* which the solicitor has entered, that is guilty of second degree murder, and that verdict would take in the defendant Haney as aiding and abetting. If you find Hall to be guilty of second degree murder, and that Haney did not aid and abet, then you would find guilty of murder in the second degree as to Hall and not guilty as to Haney. If you find that Hall be guilty of manslaughter, then it would be not guilty as to Haney, because it would be beyond possibility or legal form that the man could aid and abet in manslaughter, because it would be committed upon sudden heat of passion, and in that event you could not convict Garland Haney; but if you note a general verdict of not guilty it would be in favor of each. If you find that Hall be guilty of manslaughter, then you would not convict Haney."

The jury returned in open court a verdict of "Guilty of Manslaughter." The court held that as a matter of law under its charge to the jury that Haney could not be convicted of manslaughter, and arrested its judgment as to Haney and discharged him. From this arrest of judgment as to Haney the State appealed.

The jury evidently found a verdict of guilty of manslaughter as to both. The court, the solicitor, and the defendants' counsel so understood it.

It was not correct to charge the jury that both parties could not be guilty of manslaughter. and the jury having convicted both, it was in the power of the court to have set aside the verdict as to Haney, but it did not do so. On the contrary, the record states that he arrested the judgment upon the verdict as to Haney as a matter of law and the State, under the statute, had the right to appeal. C. S., 4649 (4) provides that the State may appeal "where judgment is given for the defendant upon arrest of judgment." There was no verdict of not guilty as to the defendant Haney, but on the contrary the verdict as to him was guilty, and the court, instead of setting aside the verdict as in its discretion it might have done, recognized that it had been so rendered by arresting judgment as a matter of law upon the mistaken idea that judgment could not be imposed, and not because there had been no verdict against Haney.

As to Haney, therefore, the case stands upon a verdict of guilty with no sentence imposed, and in such case, or when an improper judgment has been imposed, the case will be remanded to the Superior Court that sentence shall be imposed by the presiding judge upon the verdict entered upon the record that there may not be a default of justice. In *S. v. Queen,* 91 N. C., 660, where an improper judgment was imposed upon a conviction, the court held that the defendant was not entitled to be discharged, but he was to be remanded for a proper sentence to be imposed. In *S. v. Lawrence,* 81 N. C., 522, where also there was an illegal sentence imposed, the court held that the defendant should be remanded to the Superior Court that a proper judgment should be imposed upon the verdict. In the present case there was not any illegal sentence imposed, but there was a failure to impose any sentence upon the verdict which was left standing upon the docket.

Upon receipt of the certificate of this opinion, a writ will issue against the defendant on which he may give bond for his appearance at the next term of the Superior Court of Cherokee that sentence may be imposed upon the verdict of guilty in compliance with law.

The judge in this case properly told the jury that if they acquitted Hall they would necessarily acquit Haney also, as the indictment was for aiding and abetting Hall in the murder of Dean, but as Hall's crime stops short of the greater offense through interfering circumstances, the defendant Haney, as the jury properly held upon the evidence, was at least guilty of aiding and abetting in the lesser offense of manslaughter. Indeed he seems to have done fully as much of the shooting as Hall, if not more, according to the testimony. In *S. v. Cloninger,* 149 N. C., 567, it was held: "When one of the prisoners was present at the time when the deceased was killed, and, with the others, followed deceased, cursing him, and got a baseball bat away from him, with which another person struck the fatal blow, there is abundant evidence to sustain his conviction of manslaughter as an aider and abetter."

The same principle is laid down in *S. v. Worley,* 141 N. C., 764, where the court charged that, "If Clem Worley aided and abetted Thomas Worley in an assault on the deceased, then he would be guilty of murder in the second degree, manslaughter or excusable homicide according as Thomas was guilty or excusable. To same purport *S. v. Orr,* 175 N. C., 773.

In Bishop New Crim. Proc., sec. 1285, n. 68, it is said that a motion in arrest of judgment for a defect in a verdict lies only when the verdict does not conform to the indictment. If the verdict is wrong, the motion in arrest of judgment does not lie. Where the indictment is for being an aider and abetter in murder in the second degree, the jury could have so found or found, as it did, that he was guilty as aider and abetter in manslaughter. In the work just quoted, sec. 1288, it is said: "But if the indictment is good and the arrest of judgment is because of wrong verdict, only the verdict will be vacated and a new trial will be ordered." But it is clear upon the above authorities, and upon the reason of the thing, that here there was no wrong verdict, but it was based upon the indictment, and the only error was in the court arresting the judgment, which must be corrected by the defendant being brought up for sentence upon the verdict found by the jury, and which stands untouched upon the record.

Upon the evidence it seems clear that both of the defendants were expecting an arrest from the parties whom they met on the road on account of the whiskey they had with them; else why should Hall have hidden the whiskey? The officer and his posse approached the defendants with the evident intention of arresting them. They made common cause as to this when they saw the officers coming. When Haney opened fire upon Watson, it was a signal to Hall, who was further back, to take part in any difficulty, and he therefore wrenched the pistol from Dean and shot him. The judge thought that there was sufficient evidence in the case to submit to the jury the question of Haney's guilt as the aider and abetter of Hall in his commission of murder in the second degree. The jury took the most lenient view of the case and convicted them both of manslaughter. The defendant Haney quotes *S. v. Eaves,* 106 N. C., 757, which holds that: "An arrest of judgment can only be granted for defect appearing upon the face of the record; or for the omission of some matter which ought to so appear." *S. v. Hinton,* 158 N. C., 625; *S. v. Jenkins,* 164 N. C., 527. But here is no defect upon the face of the record and no omission of anything which should so appear. There was no defect appearing upon the face of the record in this case, for the trial and the verdict as to both defendants were in accordance with law, and the State is entitled to have the judgment in arrest as to the defendant set aside that the proper sentence may be imposed upon the verdict.

As to the defendant Haney, the judgment in arrest must be set aside and a writ will issue from the Superior Court of Cherokee that he be brought before the next term of the Superior Court for sentence upon the verdict against him.

As to the defendant Hall we find

No error.

STACY, J., dissents.

STATE v. NASBY HARDIN.

(Filed 2 June, 1922.)

1. **Judgments, Suspended—Sentence—Criminal Law—Inquiry—Courts—Jurisdiction.**

   It is within the power of the court having jurisdiction of a criminal action to suspend judgment on verdicts of conviction for determinate periods and for a reasonable length of time, conditioned on good behavior, and the court so acting may in its sound discretion conclusively determine from time to time whether the conditions have been violated, except where the instance being inquired into has been determined for the defendant by the jury, or other competent tribunal having jurisdiction of the criminal offense which is the sole basis of the present inquiry, in which event the result of the former action will be controlling.

2. **Judgments, Suspended—"Good Behavior"—Criminal Law.**

   Where the court within the proper exercise of its authority has suspended judgment upon conviction of the defendant in a criminal action, the term "good behavior" signifies that his conduct will be such as the law authorizes, in contradistinction to bad behavior punishable by the law.

3. **Judgments, Suspended—Investigation—Findings.**

   In order for the court having jurisdiction to impose a valid sentence upon a suspended judgment in a criminal action, it must be properly established by pertinent testimony that the conditions upon which the judgment had been suspended had been broken by the defendant.

4. Same—Ultimate Facts—Intoxicating Liquors—Spirituous Liquors—Statutes.

Findings of the trial judge, in imposing a sentence on the defendant under a suspended judgment, that the defendant had manufactured and had in his possession 150 gallons of wine, and had bought grapes therefor in another county, and persons had been seen coming from his place intoxicated, are insufficient for the imposition of the sentence, the manufacture of wine from grapes not being prohibited by the State law (C. S., 3367), and the mere possession, unless for the purposes of sale, being lawful. Nor is it *prima facie* evidence of guilt if the wine had been manufactured from grapes grown on the owner's premises. C. S., 3379.

5. Same—Inferences.

The findings of the trial judge on imposing a sentence under a suspended judgment in a criminal action are insufficient where they only permit the inference of a breach of the condition, and do not find the ultimate fact of guilt in infringing the criminal laws of the State.

6. Judgments, Suspended—Investigation—Courts—Jurisdiction—Inferior Courts.

The judge of the Superior Court having jurisdiction is not concluded in determining whether the defendant has broken the condition annexed to a suspended judgment, and passing sentence thereunder, by a judgment of a recorder's court not having jurisdiction, acquitting the defendant of the offense under investigation.

7. Judgments, Suspended — Sentence — Federal Law—Findings—Inferences—Intoxicating Liquor—Spirituous Liquors—Findings.

The XVIII Amendment to the Constitution of the United States, and Volstead Act designed to make it effective, does not condemn or make unlawful the manufacture of liquor for certain specified purposes, or under certain conditions, and a finding of the judge of the Superior Court that the defendant, under a suspended judgment, had manufactured large quantities of wine, is not sufficient upon which he may pass the sentence, upon condition broken, the ultimate fact of guilt not having been found by him. *S. v. Yates, ante,* 753, concerning the exercise of the pardoning power vested by our Constitution in the Governor, cited and distinguished.

8. Same—Courts—Jurisdiction.

The State courts have no jurisdiction over offenses arising exclusively under the XVIII Amendment to the Constitution of the United States and the Volstead Act passed for its enforcement; and where the State court has suspended judgment against the defendant conditioned on his good behavior, this without more should be considered only in connection with the State statutes on the subject of prohibition, that our courts have jurisdiction alone to enforce, and not with reference to the Federal law on the subject.

9. Judgments, Suspended—Sentence—Collateral Agreement—Attorneys' Fees—Double Punishment.

A sentence imposed under a suspended judgment in a criminal action upon condition of good behavior broken, is not objectionable as double punishment for the same offense, by reason of the fact that the defendant had performed his agreement to reimburse the private prosecutors for money they paid in attorneys' fees in the action.

10. Appeal and Error — Suspended Judgments — Case Remanded—Procedure.

Where the Supreme Court has reversed the action of the Superior Court judge in imposing a sentence under a suspended judgment in a criminal action, for an insufficiency of finding as to the defendant's ultimate guilt, the judgment will be set aside and the cause remanded to be proceeded with according to law.

CLARK, C. J., dissenting.

APPEAL by defendant from *Kerr, J.*, at November Term, 1921, of ROBESON.

On the hearing it was made to appear that, at July criminal term preceding, defendant was convicted or submitted to an indictment charging him and three others with the crime of assault with intent to kill one Burnett. At said July term the following entries appeared upon the record: "With the consent of the solicitor, all the defendants, including the defendant Hardin, submitted to the crime of assault with a deadly weapon. Whereupon prayer for judgment was continued upon the payment of the cost, the defendant agreeing to pay $200 to the private prosecutors to reimburse them for counsel fees paid out in prosecution of this cause, which has been paid, together with the cost." And thereupon order was made in the cause as follows: "Prayer for judgment continued by consent upon payment of the cost; defendants to appear at each criminal term of this court for two years and show that they have been of good behavior and not violated the law in any respect." The case on appeal then proceeds with the further statement that, "On Friday preceding the convening of the November Criminal Term, 1921, of the Robeson Superior Court, the defendant was tried before David H. Fuller, recorder of the Lumberton District, upon two indictments, one charging him with having more intoxicating liquors in his possession than is allowed by law, and another indictment charging him with having sold intoxicating liquors contrary to law. The defendant plead not guilty to both these indictments, and the same was tried before a jury and the defendant was acquitted on both charges; thereafter, to wit, on Monday, the first day of the November Criminal Term, 1921, of the Robeson Superior Court, the solicitor prayed judgment against the defendant upon the indictment tried at the July Criminal Term, 1921, of the Robeson Superior Court, in which prayer for judgment was continued, as set out in the record. Upon this prayer for judgment by the solicitor, and upon statements of the sheriff and deputy sheriff, upon which the facts stated in the following judgment were found, the court entered the following judgment: "At the July term of this court, 1921, the defendant Nasby Hardin was convicted by the jury of an assault with intent to kill Lacy Burnett. Prayer for judgment was continued for two years by consent and upon payment of cost. At this term of the court the defendant was called to appear and show cause that he had been of good behavior. It appeared to the court and the court finds as a fact that the defendant had manufactured and had in his possession more than 150 gallons of wine; and that the defendant had bought grapes in Bladen County; that persons had drunken of the said wine, and numerous persons had been seen going to and from the home of the said Nasby Hardin intoxicated. The said Nasby Hardin was indicted upon the attached warrant and tried by Recorder D. H. Fuller and jury; found not guilty, and these are the same charges in above findings. Thereupon the court, on motion of the solicitor, S. B. McLean, of this district, sentenced the said Nasby Hardin to be confined in the county jail of Robeson County for a term of twelve months, to be worked on the public roads of said county." Defendant excepted and appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Britt & Britt and McLean, Varser & Stacy for defendant.

HOKE, J. The power of a court having jurisdiction to suspend judgment on conviction in criminal cases for determinate periods and for a reasonable length of time is fully recognized in this jurisdiction. *S. v. Hoggard,* 180 N. C., 678; *S. v. Greer,* 173 N. C., 759; *S. v. Tripp,* 168 N. C., 150; *S. v. Everitt,* 164 N. C., 399; *S. v. Crook,* 115 N. C., 760. And these and other cases on the subject hold, also, that the suspended judgment may be on the condition of good behavior of defendant for like determinate and reasonable periods of time, and that on inquiry duly instituted, the court having jurisdiction, and hearing the matter, may in its sound discretion determine for itself whether the conditions have been violated. *S. v. Greer, supra; S. v. Tripp, supra; S. v. Everitt, supra.* A position that is modified, however, where it is properly made to appear that a defendant has been acquitted by the jury or other competent tribunal having jurisdiction of the criminal offense which is the sole basis of the proceedings. As to that fact, and to that extent, the court or judge hearing the matter of the suspended judgment should be concluded.

The authorities are to the effect further that where a judgment has been suspended on condition of payment of cost and good behavior, etc., the term "good behavior," by correct interpretation, means conduct that is authorized by law and bad behavior such as the law will punish.

In re Spencer, 22 Federal Cases, No. 13233, pp. 921-922. And that in order to a valid sentence on such suspended judgment it must be properly established by pertinent testimony that the conditions have been broken within the meaning and purport of the above principle. *S. v. Hilton,* 151 N. C., 687. Applying the doctrine, as set forth and approved by these authorities, the sentence of the court imposing judgment on the defendant cannot be upheld, for it appears neither by evidence nor finding of the court that there has been any breach of the criminal law of the State on the part of the defendant since said judgment was suspended. True, his Honor finds that defendant had manufactured and had in his possession as much as 150 gallons of wine. That defendant had bought grapes in Bladen County and persons had been seen coming from his place intoxicated. But the manufacture of wine from grapes is not prohibited by the laws of this State. C. S., 3367. Nor is the possession of any quantity of wine an indictable offense, unless held for purpose of sale. C. S., 3379. And though the section last cited makes the possession of more than three gallons of wine *prima facie* evidence of guilt, it seems that neither the section nor the rule of proof prevails as to wines made of grapes grown on the premises of the holder. While the facts as found by his Honor may permit and perhaps justify an inference of guilt, the ultimate fact of guilt has not been found by him, nor is it otherwise established the only tribunal which has undertaken to make a finding on the question, to wit, the recorder's court, having found defendant not guilty of any criminal offense. On the record, such action of the recorder's court may not be considered as controlling on the present hearing, from the fact that such court did not have jurisdiction of the offenses charged, the punishment on conviction being discretionary, and the jurisdiction of said recorder's court for offenses of this character being restricted to cases where the punishment may not exceed a fine of $200 or imprisonment for one year, but it no doubt afforded a reason for the hesitation of his Honor in declaring the defendant guilty.

It is urged in support of the present judgment that while the facts found by his Honor may be only evidential as to a breach of the criminal laws of the State, they are sufficient of themselves to amount to a finding as to a violation of the Federal regulations on this subject as contained in the Eighteenth Amendment and the Volstead Act, passed by Congress with the view and purpose of making the amendment effective. Speaking in general terms, this Eighteenth Amendment prohibits within the territory of the United States the manufacture, sale, or transportation of intoxicating liquors for beverage purposes. And the Volstead Act, designed, as stated, to make this amendment effective, makes it a criminal offense to manufacture such liquors for the purpose indicated. The manufacture of intoxicating liquors for other and certain specified purposes is not condemned either by the prohibition amendment or the act of Congress, the statute, however, providing that in order to a lawful manufacture, there must be a permit from the Revenue Department of the Government. Even under the provisions of the Federal law, therefore, the findings of his Honor fail to declare the ultimate fact of defendant's guilt, in that it makes no reference to the purpose of defendant in manufacturing the 150 gallons of wine, nor is it declared whether defendant had or had not a valid permit for the purpose. Apart from this we have held in two or more recent cases that the State courts are without power or jurisdiction to administer the provisions of the Volstead Act. *S. v. Barksdale,* 181 N. C., 621; *S. v. Helms,* 181 N. C., 566.

When the State court, therefore, suspended judgment on condition that the defendant should be on good behavior, that is, should not break the law for two years, this, without more, should be construed as meaning the State law, the only law the court had jurisdiction to enforce, and where it appears that the defendant is keeping or has kept that law, it is both right and just that the State authorities should keep faith with him and forbear an imposition of sentence.

Again it is contended that the present judgment finds support in *S. v. Yates, ante,* 753, a decision made at the present term, in which the power of the Governor to annex conditions of similar import to a pardon granted by him, the power being upheld in a forcible and learned opinion by *Associate Justice Adams.* In that case the applicant had been condemned by the law, and the Governor was in the exercise of the prerogative of mercy, under a constitutional power containing express provision that except in case of impeachment the Governor could grant pardons, commutations, etc., under such conditions as he may see proper. Acting in amelioration of defendant's condition, the Governor is purposely made a law unto himself, subject to the limitation that the conditions imposed must not be "illegal, immoral, or impossible of performance."

But not so as to the administration of the law by the courts. Here the judge sits in judgment and not in the exercise of mercy. He can only proceed along fixed and well ordered lines, that a citizen, defendant or other, may know his rights, and while he keeps faith, these rights must be recognized and preserved to him. In this case, as we have seen, judgment was suspended with the understanding that he would pay the sum of $200 to the counsel who had prosecuted him. This he has paid, and on the condition that he be of good behavior, that is, that he do not violate the State law. This condition he has thus far kept, so far as the record has established, and for anything that now appears, he is not subject to sentence.

We are not inadvertent to the position urged for defendant that he may no longer be punished under this conviction by reason of having paid the $200 as counsel fee, pursuant to his agreement made at the July Term, 1921, on the principle that a defendant may not be twice punished for the same offense. But the principle invoked, in our opinion, has no application to the facts of this record, it appearing that such payment constituted no part of any judgment against defendant, but was paid in pursuance of his agreement to that effect, and the prayer for judgment being expressly continued on condition of defendant's good behavior for two years, which time has not expired. Such a prayer being made for the amelioration of his condition, and presumably with his consent. *S. v. Everitt, supra; S. v. Hilton, supra; S. v. Crook, supra.*

For the reason stated, the judgment against the defendant will be set aside, and the cause remanded to be proceeded with in accordance with this opinion, and the Superior Court will inquire and determine whether there has been such a breach of the State law on the part of defendant as will justify and uphold a sentence on the suspended judgment.

Remanded.

CLARK, C. J., concurs in the body of the opinion of the court, but dissents from the conclusion. In this cause the defendant having been convicted by a jury, at July Criminal Term, 1921, of the Superior Court of Robeson, of the crime of assault with a deadly weapon, with intent to kill, by the consent of the solicitor and the defendant an entry was made in the cause as follows: "Prayer for judgment continued by consent upon payment of costs; defendant to appear at each criminal term of this court for two years and show that he has been of good behavior and *not violated the law in any respect.*"

At the very next term of the court, in November, 1921, upon prayer of judgment by the solicitor and upon statement of the sheriff and deputy sheriff, upon which the facts stated in the following judgment were found, the court entered the following judgment: "At the July term of this court, 1921, the defendant, Nasby Hardin, was convicted by the jury of an assault with intent to kill Lacy Burnett, prayer for judgment was continued for two years by consent and upon payment of costs. At this term of the court the defendant was called to appear and show cause that he had been of good behavior. It appears to the court, and the court finds it a fact, that this defendant had manufactured and had in his possession as much as 150 gallons of wine, and that the defendant had bought grapes in Bladen County; that persons had drunken of the said wine, and numerous persons had been seen going to and from the home of the said Nasby Hardin intoxicated. Thereupon the court, on motion of the solicitor, S. B. MacLean, of this district, sentenced the said Nasby Hardin to be confined in the county jail of Robeson County for a term of 12 months, to be worked on the public roads of said county."

Upon the said finding of facts by the judge, the only question that can arise is whether the defendant has kept the conditions upon which the sentence was suspended at the previous term, that is, has he been "of good behavior and not violated the law in any respect."

The Constitution of the United States provides as follows, Article VI (2): "This Constitution, and the laws of the United States which shall be made in pursuance thereof, . . . shall be the supreme law of the land and the judges in every state shall be bound thereby, anything in the Constitution and laws of any state to the contrary notwithstanding." This is an injunction upon every state judge which in his oath of office he is sworn to obey as the *highest* law, any state constitution or law to the contrary notwithstanding.

The Eighteenth Amendment to the United States Constitution provides: "After one year from the ratification of this article, the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States, and all territory subject to the jurisdiction thereof, for beverage purposes is hereby prohibited." Section 2 of that article provides: "The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation"; and the Volstead Act, passed in pursuance of that amendment, in section 3, makes it a criminal offense to manufacture intoxicating liquors, and defines wine to be intoxicating liquor, and provides further that in order to be a lawful manufacture there must be a permit from the Revenue Department of the Government.

As the Constitution of the United States, and the laws made in pursuance thereof, are the highest law of this land, the trial judge could not have held that these facts found by him were not a breach of the conditions upon which judgment had been suspended, and that the defendant had been "of good behavior and had not violated the law *in any respect*." He had violated the highest law known to this Country, the Constitution of the United States, and the laws made in pursuance thereof. It was suggested in the argument here by the defendant's counsel that the defendant might have procured a permit from the United States Revenue Department to make this wine, but there is no such suggestion in the evidence, or in the record, and being a matter in defense, it cannot be assumed. The burden was upon the defendant to allege and to prove the exception that would take him from under the statute which denounces such conduct. This is an elementary and uncontradicted principle of criminal law.

It was further suggested by counsel that the judge did not find as a fact that the defendant had violated the law, but when the court found that the defendant "had manufactured and had in his possession as much as 150 gallons of wine; that he had bought grapes in Bladen County and numerous persons had drunken of said wine and had been seen coming from his place intoxicated," he found him guilty of the acts denounced by the law as a crime. It was unnecessary for the judge to give a title to the offense or to add more than this statement of acts which the defendant had committed and which were violations of law.

It was suggested that this Court does not execute the laws of the United States, but the contract of the defendant upon which this judgment was suspended was that he should not *violate the law in any respect,* and if there had been a State statute expressly authorizing the defendant to manufacture wine and buy grapes and sell the wine, it would have been a nullity in view of the United States Constitution, Art. VI, sec. 2, that the Constitution and the laws of the United States in pursuance thereof "shall be the supreme law of the land, and the *judges in every state* shall be bound thereby, anything in the constitution and laws of any state to the contrary notwithstanding."

It should be noted that the defendant is not on trial for the manufacture and sale of wine, but had already been convicted by a jury for an assault with intent to kill. That verdict stands. Judgment thereon was simply *suspended* upon a contract that he should not violate the law "in any respect," and a breach of the law, whether it is municipal, State, or Federal, is a violation of the law, and of the obligation "of good behavior." It is not required that the breach of the law shall be in any one particular respect. It is true that the State, except in a few cases, does not enforce the Federal laws, but when the Eighteenth Amendment forbids doing the things which the defendant has done, it strikes out any state statute, or any proviso in a state statute, if there had been any, which would permit such things to be done, and they become nonexistent in the state statute.

It was contended by the defendant that C. S., 3367, permits wine and cider to be manufactured from grapes, berries, fruits, etc., but it must be noted: (1) That this proviso was enacted long before the ratification of the Eighteenth Amendment, and the enactment of the Volstead Act has had the effect of striking out the permission given by that proviso just as the Nineteenth Amendment struck the word "male" out of every state constitution as a qualification for voting. And, besides, C. S., 3378, a later enactment, forbids in any manner "handling spirituous, vinous, or malt liquors in this State"; and C. S., 3379 (2) makes it *prima facie* evidence of violation of law to possess more than three gallons of spirituous liquors at any time. That section, without that proviso, absolutely forbids any one "to manufacture, or in any manner make or sell, or otherwise dispose of for gain, any spirituous, vinous, fermented, or malt liquors or intoxicating bitters within the State of North Carolina"; and as the superior law has stricken out that proviso, even if the defendant were on trial in a state court for this offense, he would be guilty, for the proviso cannot possibly exempt him. To do that would be to hold that the State act can nullify the Federal Constitution and the laws enacted in pursuance thereof; (3) even if the State could thus nullify the provisions of the Federal amendment and statute, still it would have been incumbent upon the defendant, if on trial, to allege and to set up the fact that this wine was manufactured by him, and that it was not drunk (in the language of the proviso itself) "upon the premises." Our statute, C. S., 3368, as well as the Volstead Act, both prescribe that wine is an intoxicating liquor.

I concur in the opinion of the Court that the action of the recorder in finding the defendant not guilty is no estoppel upon the action of the Superior Court putting in operation a suspended judgment, and which cannot be interfered with by judgment in the recorder's court. *S. v. Greer,* 173 N. C., 759, which, besides, had no jurisdiction. *S. v. Hicks,* 179 N. C., 733.

If a man commits a homicide it may be that it was done in the heat of passion or to avenge a fancied or real wrong done him; if he commits larceny, it may be done under the strong influence of hunger of himself or his wife and children; if he commits rape, it may be under the influence of passion; and so of many offenses against the law there may be found more or less extenuating circumstances; but that cannot be said of this offense. To violate the law in this respect the man does not act from passion or strong impulse, or any necessity. He proceeds upon the most sordid basis, and deliberately, with preparation and secrecy, violates the law of his Country, for the sordid purpose of gain. Neither is this a slight offense. It comes as near treason as any in the calendar, for it sets at defiance the solemn enactment expressing the highest and most deliberate will of the supreme power of this Country. It was not enacted in haste, but after nearly a century of discussion and debate. It was considered of sufficient importance to the public welfare to be enacted by a two-thirds vote in each House of Congress, and was then ratified by the Legislatures of 46 out of the 48 states in this Union. It was enacted to lessen poverty and crime and other matters detrimental to the public welfare. Every voter, as well as every office holder, has sworn to maintain that provision as the highest law between the two great oceans. Every state judge has sworn to support such provision, "the constitution and laws of any state to the contrary notwithstanding." The learned judge who tried this case was acting in the performance of his duty in calling down upon the head of this defendant punishment for the high crime of which he had been convicted and judgment on which, at his request, had been suspended upon a pledge that for two years this defendant would not violate the law *in any respect* upon penalty of the suspended judgment being put in force.

Judge Kerr having found the facts above set out, properly held that the defendant had not kept his obligation *"not to violate the law in any respect,"* for he had violated the highest law, which even an express State statute could not nullify—much less could a *proviso* as to facts unalleged and unproven do so, and the judge did his duty in revoking the suspension of the judgment when the defendant had so speedily broken the conditions upon which it had been suspended.

It was once an accepted saying that "the King's writ does not run in Connaught"—a wild, lawless province in the west of Ireland. But the Constitution and laws of the United States are as much authority in North Carolina as anywhere else throughout the Union. The judge having found that the defendant had "bought grapes in another county, had manufactured *as much* as 150 gallons of wine, that numerous men had drunken of this wine, and had been seen coming from defendant's place intoxicated," if it was error for the judge in this case to hold that the defendant had broken his obligation (on which the judgment against him had been suspended) "not to violate the law in any respect," then the laws of the United States, set out in the Volstead Act, do not "run in North Carolina," and it would not be "a violation of law in any respect" for a great corporation to buy grapes all over the State, manufacture many thousands of gallons of wine, that numerous men should drink of that wine and be seen coming from their factory intoxicated. The sole difference is that here the defendant, already convicted of a serious crime with a judgment suspended on condition he shall be of good behavior and "not violate the law in any respect" has manufactured *as much* as 150 gallons—how much more than that does not appear.

STATE ON RELATION OF R. D. LOVINGOOD, TREASURER, ETC., AND THE BOARD OF COMMISSIONERS OF CHEROKEE COUNTY ET AL. v. P. C. GENTRY AND UNITED STATES FIDELITY AND GUARANTY COMPANY.

(Filed 2 June, 1922.)

1. **Sheriffs—Taxes—Compensation—Fees—Salaries—Statutes.**

The provisions of chapter 101, Public Laws of 1917, allowing 5 per cent to sheriffs for the collection of taxes upon an amount not exceeding fifty thousand dollars, and in excess thereof 2½ per cent, etc., expressly excluded sheriffs whose compensation was fixed upon a salary basis: afterwards modified by the laws of 1919, but declared by the extra session of the Legislature of 1920, ch. 1, sec. 10, as not to repeal any local or general law regulating the salaries or fees of county officers except so far as such local or general laws were in conflict with the provisions that sheriffs should receive 5 per cent on all privilege or license fees collected, etc.: *Held*, the fees to be paid the sheriff are under legislative control, and a sheriff upon a salary basis who received the tax book for 1920, after the laws of 1920 were effective, is not entitled to any commissions on taxes collected for that year that did not fall within the exception made by the statute.

2. Same—Extension of Time for Settlement.

Where the sheriff has been put upon a salary basis for the collection of taxes for a certain year, and time for settlement has been extended by the county commissioners to a following year, wherein his compensation has been placed by legislative enactment upon a fee basis, the extension of the time was a matter of grace and did not fall within the prospective intent of the later statute as to commissions allowed for the sheriff's compensation.

3. Same—Settlement—Penalties.

The Legislature has the power to impose penalties on the sheriff for his delay or failure to make settlement with the proper county authorities within a stated time, and while statutes of this character should be strictly construed, no interpretation is required beyond the plain meaning of the statute clearly expressed, or exempt the sheriff from the payment of the penalty when he has failed to have obtained an extension of time from the county commissioners as required by the statute in such cases.

4. Same—Accounting—Auditing.

Where a sheriff of a county has failed to make settlement of money collected for taxes, as required by law, but has unsuccessfully sought to obtain an extension of time from the county commissioners, he may not successfully resist the statutory penalty under the provisions of C. S., 8050, on the ground that the county board of commissioners had not appointed a committee to audit the account between him and the treasurer, especially when the commissioners had appointed a special auditor who could have acted on the account at any time.

5. Sheriffs — Taxes—Penalties—Judgments—Actions—Facts at Issue—Issues.

The penalty of $2,500 recoverable as a forfeiture against a sheriff under the provisions of C. S., 8051, is where he fails, neglects, or refuses to make settlement or to render an account to the county treasurer and auditing committee upon demand; or his failure, neglect or refusal to pay over the amount rightfully found to be due after account had or settlement made: and a recovery of such penalty may not be properly allowed in a judgment upon an affirmative finding, in an action where the cause was heard and determined upon the single question as to whether the defendant sheriff had failed to pay over the amount which the plaintiff claimed to be due.

STACY, J., did not sit.

APPEAL by both parties from *Brock, J.,* at April Term, 1922, of CHEROKEE.

Civil action heard on exception to referee's report.

The defendant Gentry was sheriff of Cherokee County from December, 1914, to December, 1920, and executed official bonds with the defendant United States Fidelity and Guaranty Company as his surety.

Suit was brought by the plaintiffs and pleadings filed. The case was referred to S. W. Black, referee, before whom there was a repleader. The plaintiffs alleged that a settlement had been made with the defendant for 1919, and that the tax books for 1920 were turned over to him, and that he had failed to account for $13,472.38. The plaintiffs demanded judgment for this sum and $2,500 as a penalty for failure promptly to make settlement.

The defendant alleged that he had settled for 1919 under protest, without deducting his commissions; that he was entitled to $4,834.63 as commissions, and that he was ready to settle the taxes for 1920 if allowed proper credits, including commissions. He alleged also that the board of commissioners had failed to appoint an auditing committee, and that he had never been able to settle; that there was due him $2,053.18 on the current funds and $387.42 for special bridge fund for 1918. The plaintiffs filed a replication denying these allegations.

The referee filed his report 31 March, 1922, to which there were exceptions. His Honor adopted almost all the referee's findings of facts and all his conclusions of law, sustained certain exceptions and rendered judgment. Both the plaintiffs and the defendants excepted and appealed.

J. H. McCall, J. D. Mallonee, and Dillard & Hill for plaintiffs.

J. N. Moody, Donald Witherspoon, E. B. Norvell, and Harkins & Van Winkle for defendants.

DEFENDANTS' APPEAL.

ADAMS, J. The defendant Gentry insists that he is entitled to a commission of 5 per cent on the first $50,000, and 2½ per cent on any additional amount collected by him as taxes for the year 1920. In November, 1918, he was reëlected sheriff for a term of two years and was inducted into office in December. He received the tax book for 1920 about 1 October. Public Laws of 1917, ch. 234, sec. 101, contains this proviso: "This act shall not apply to or affect the compensation allowed sheriffs of the counties who receive salaries for the collection of taxes." The Legislature of 1919 struck out this proviso and modified the compensation allowed sheriffs for such collection. At the extra session of 1920 an act was passed declaring that it was not the object of the amendment of

1919 to repeal any local or general law regulating the salary or fees of county officers except so far as such local or general laws were in conflict with the provision that sheriffs should receive for their own use a commission of 5 per cent on all privilege and license taxes collected under Schedule B of the Revenue Act, and that it should be deemed and held that all such local or general acts regulating the salary or fees of county officers had continued in full force, except in the respect indicated. Public Laws, Extra Session 1920, ch. 1, sec. 10. This act, ratified 26 August, 1920, was in effect when the defendant Gentry received the tax book for that year, and as he was paid a salary in full compensation for his services as tax collector, and as his fees were subject to legislative control, he is not entitled to the commissions claimed. Public-Local Laws 1913, ch. 63, sec. 6.

This conclusion is not affected by the provisions of the Public-Local Laws of 1921, ch. 523, sec. 1. The extension of time for the settlement of county taxes to the first Monday in May was a matter of grace, and was obviously not included in the terms of the statute, which was prospective in its operation.

The second question relates to the penalty of 2 per cent per month. "The sheriff or tax collector shall pay the county taxes to the county treasurer or other lawful officer. He shall at no time retain over $3,000 for a longer time than ten days, under a penalty of 2 per centum per month to the county upon all sums so unlawfully retained, and shall, on oath, render a statement to the board of commissioners at their monthly meeting of the amount in his hands. On or before the first Monday of February in each year the sheriff shall account to the county treasurer or other lawful officer for all taxes due the county for the fiscal year, and on failing to do so he shall pay the county treasurer a penalty of 2 per centum per month on all sums unpaid, and this shall be continued until final settlement: *Provided*, the board of county commissioners may in their discretion relieve the sheriff or tax collector of said penalty of 2 per centum per month upon payment in full of the county taxes: *Provided further*, the county commissioners may extend the time of settlement of county taxes by the sheriff of the county to the first Monday in May." C. S., 8048. The time for settling the taxes for 1920 was extended by the board of commissioners to the first Monday in May, 1921. Moreover, the statute enacted for the benefit of Cherokee County provides that "all taxes must be collected and settled for by said sheriff and tax collector on or before the first day of May succeeding the year in which the same was listed." Public-Local Laws 1913, ch. 63, sec. 6. The judgment allows interest from the first Monday in May, 1921.

That the General Assembly is clothed with authority to impose penalties for the delay or failure of a tax collector to account is axiomatic.

The power to coerce prompt collection and settlement of taxes is no less necessary than the power to levy and assess them, and both are essential to the maintenance of the government. Penal statutes, of course, must be strictly construed, but in the judgment of the court there is nothing that extends the construction of the statute beyond its plain meaning. The board of commissioners in the exercise of their discretion declined to relieve the defendant of the penalty, and we discover no reason for holding that he should be exempted from the payment of the interest incurred by his default.

The defendants demurred *ore tenus,* and moved to dismiss the action on the ground that the board of commissioners had not appointed a committee to audit the account between the sheriff and the treasurer. C. S., 8050. Under the circumstances disclosed by the record the motion cannot avail the defendant. Repeatedly beyond the ten-day limit he retained money in excess of $3,000, and instead of accounting to the treasurer, applied for an extension of time for his settlement. Besides, section 8050 is not applicable. The board of commissioners appointed a special auditor by whom the defendant's account could have been audited at any time. Public-Local Laws 1913, ch. 63, sec. 10.

On the appeal of the defendants we find

No error.

APPEAL BY PLAINTIFFS.

ADAMS, J. The plaintiffs excepted to his Honor's refusal to permit recovery of $2,500 as a forfeiture to the State for the use of the county under the provisions of C. S., 8051. The exception is not tenable. The penalty prescribed may be recovered (1) where upon demand the sheriff fails, neglects, or refuses to make settlement or to render an account to the county treasurer and auditing committee, or (2) where after account had or settlement made the sheriff fails, neglects, or refuses to pay over the amount rightfully found to be due. In the record neither of these conditions appears. There was a repleader before the referee, and in accordance with the amended pleadings, the case was heard and determined upon the single theory that the defendant "had failed to pay over" the amount which the plaintiffs claimed to be due. *Davenport v. McKee,* 98 N. C., 500; *Williamson v. Jones,* 127 N. C., 178.

On the plaintiffs' appeal there is

No error.

STACY, J., not sitting.

SALLIE TRITT, ADMINISTRATRIX OF CARL TRITT, ET AL v. GLOUCESTER LUMBER COMPANY.

(Filed 17 May, 1922.)

Employer and Employee—Master and Servant—Negligence—Instructions—Duty of Employer—Safe Place to Work.

The duty of an employer to provide his employee a safe place to work extends only to his exercise of ordinary care, and an instruction in the employee's action for damages alleged to have been caused by the negligence of the defendant therein, is reversible error, which omits this as an element in the standard of duty, and in effect makes the duty an absolute or unconditional one.

APPEAL by defendant from *Shaw, J.*, and a jury, at December Term, 1921, of TRANSYLVANIA.

Action to recover damages for negligently causing the death of plaintiff's intestate. There was denial of liability and plea of contributory negligence, and on issues submitted the jury rendered a verdict for plaintiff assessing the damages. Judgment on the verdict, and defendant excepted and appealed.

Ralph Fisher, Lewis Hamlin, and Sutton & Stilwell for plaintiff.
Martin, Rollins & Wright and W. E. Breese for defendant.

PER CURIAM. There were facts in evidence tending to show that on or about 4 June, 1921, plaintiff's intestate, an employee of defendant company on the logging train in said county, while engaged in his duties as brakeman on one of defendant's trains, fell, or was thrown or jolted off said train and run over and killed. There was testimony on the part of plaintiff tending to show that the falling from the train and the consequent death was caused by an unusual, unnecessary, violent jerking of the train, and also because of the defective condition of the roadbed at the place of the injury. There was testimony for the defendant to the effect that the roadbed was in sound condition where the injury occurred, and further, that there was no unusual or violent jerking of the train at the time. In submitting these opposing views, the court, among other things, charged the jury as follows: "Now, the court instructs you that it was the defendant's duty to provide a reasonably safe place for the plaintiff to work, and if it failed to provide such a safe place for him to work, and in consequence of that the death of intestate was caused, and those facts are found by the greater weight of the evidence, it is your duty to answer the issue 'Yes.'" It is the established rule in this jurisdiction that the obligation to provide for employees a safe place to work, or a reasonably safe place to work, is not absolute, but it is required that the employer must do this in the exercise of ordinary care, and a charge that omits this as an element in the standard of duty will be held for reversible error. This is held in *Gaither v. Cement Co., ante,* 450, where the correct position as approved and illustrated in numerous decisions is stated for the Court in an opinion by *Associate Justice Adams.* In deference to that authority, which we regard as controlling on the facts of the present record, we are of opinion that for the error indicated defendant is entitled to a

New trial.

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1. *Actions—After-born Children—Contingent Interest—Class Representation.*—W. executed a deed, reciting in the *habendum* a conveyance to A. and M. for life, and at their death to their children, reserving a life estate. Following the description was a provision that A. should have the eastern part during her natural life, and at her death the land should go to her children, and that M. should have the western part for life and at her death to her children, if any, but if she should die leaving no children, then to A. for life and at her death to her children. A. was married and had children; M. was not married. In 1904 M. was the mother of two children. A special proceeding was begun by M. and her two children to sell the land. The sale was made and confirmed in 1904. In 1908 two other children were born to M., and they now claim an interest in the land: *Held*, they cannot recover, on the ground that a remainder to a class vests in right, but not in amount in such of the objects of the bounty as are *in esse* and answer the description, and in this proceeding the children *in esse* represented those born afterward. *Lumber Co. v. Herrington*, 86.

2. *Actions—Equity—Nonsuit—Statutes—Executors and Administrators.*—Where there is evidence in support of defendant's counterclaim that she had rendered services to her mother, in the latter's lifetime, under an express promise to pay for them, and that her mother had died without property, except her home place, which continued to remain in the defendant's possession after her death; and that the plaintiff was the grantee of her brother, who had obtained the *locus in quo* by a fraudulent deed from his mother of which the defendant had full knowledge, or actual or constructive notice thereof: *Held*, the fact that more than one year had elapsed before the beginning of the present action, from the termination by nonsuit of the defendant's action to recover for such services from the administrator of her

ACTIONS—*Continued.*

mother, does not bar her recovery upon her counterclaim, the same being of an equitable nature to which our statute, C. S., 415 (Rev., 370), has no application, under the facts of this case, the defendant having, all the time, had continuous possession of the land. *Mast v. Tiller* cited and approved. *Shell v. Lineberger*, 440.

3. *Actions—Ejectment—Common Source of Title—Estoppel.*—The plaintiff in ejectment may establish his title to the lands in dispute by connecting the defendant with a common source and showing a better title in himself, the rule thus applying not being strictly an estoppel, but a rule of justice and convenience adopted by the courts to relieve the plaintiff from the necessity of going behind the common source in order to maintain his action. *Howell v. Shaw*, 460.

4. *Same—Limitation of Actions—Adverse Possession—Evidence—Estates—Nonsuit—Trials.*—In an action of trespass and damages for the unlawful cutting and removing of timber upon the plaintiff's lands, there was evidence of plaintiff's and defendant's chain of title from a common source, and that one of the deeds under which the defendant claims was only of a life estate, but that through inadvertence or mutual mistake this should have conveyed the fee. The defendant was in possession and claimed title by adverse possession under color of this deed: *Held*, the defendant's motion as of nonsuit under the conflicting evidence was improperly allowed upon the principle that if a life estate were outstanding, his possession, during its continuance, would not be adverse to the plaintiff; and the action should be retained under the provisions of C. S., 889: *Held further*, that while the evidence in this case as to location of the land was meager it is sufficient. *Ibid.*

5. *Actions—Wrongful Death—Statutes—Conditional Right—Limitation of Actions—Pleadings—Proof.*—An action to recover damages for a death caused by wrongful act did not lie at common law and exists only in North Carolina by provision of our statute, C. S., 160, requiring that it be brought within one year, not as a statute of limitation, which must be pleaded, C. S., 405, but as a condition annexed to the plaintiff's cause of action, and which he is required to prove at the trial to sustain his statutory right of recovery. *Hatch v. R. R.*, 617.

6. *Same—Summons—Alias Summons—Continuity of Process.*—Where, in an action to recover damages for a death caused by a wrongful act, C. S., 160, the summons has been issued within a day or two from the termination of the year, annexed as a condition, and returnable thereafter, and according to the officer's certificate thereon, uncontradicted, it was not returned at the term therein named, but at a later term of the court, with another summons issued upon affidavit after the period required by the statute, endorsed "alias original," without further indication that it had been issued for an alias process or on order from the judge: *Held*, such service is insufficient to meet the requirement that the action shall be commenced within a year from the date of the wrongful death. *Ibid.*

7. *Same—Jurisdiction—Service—Corporations—Copies of Process.*—While an action is commenced against the defendant when the summons is issued against him, C. S., 404, 475, jurisdiction of the cause and of parties litigant can only be acquired in actions *in personam* by per-

ACTIONS—*Continued.*

sonal service of process within the territorial jurisdiction of the court unless there is an acceptance of service or a voluntary general appearance, actual or constructive, and where the defendant is a corporation, the requirement that copies thereof be delivered to certain designated officers or to the local agent, must ordinarily be strictly observed and certified to by the process officer, etc., as required by law, in order to a valid service of process. *Ibid.*

8. *Same.*—Where the local officer of a corporation for the service of summons has read the summons, but in good faith has mistakenly informed the process officer that he was not the one upon whom valid service could be made, but that it should be made on the defendant's president living in a different county, and without leaving the copies as the statute requires, the process officer served the summons on the president, as designated, after the return term, and the certificate of the officer shows only the service on the latter: *Held,* neither the conversation with the local agent nor the pretended service of the orginal summons on the president after the return day was effective to confer jurisdiction, and the service in each instance was a nullity. *Ibid.*

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1. *Appeal and Error—Courts—Verdict Set Aside on One Issue.*—When it appears from the evidence, the charge of the court, and the verdict that the jury has committed a palpable error in the answer to one of the issues, it is the duty of the trial judge to set it aside to prevent a miscarriage of justice. *Hussey v. R. R.*, 7.

2. *Same—Railroads—Damages—Penalties—Statutes—New Trials.*—In an action against a railroad company to recover damages to a shipment of goods and the penalty for the failure of defendant to pay the same within 90 days, as allowed by C. S., 3524, the issues raised are entirely separate and distinct from each other, and the trial judge may set aside the verdict on the second issue, and retain that on the first one for a retrial. *Ibid.*

3. *Same—Evidence—Instructions—Questions of Law.*—In the plaintiff's action to recover damages against a railroad company to a shipment of goods and a penalty for the failure of the defendant to pay the claim for 90 days, C. S., 3524, and the evidence tends only to sustain the plaintiff's demand, on both issues, the judge may retain the verdict on the issue of damages answered in plaintiff's favor, set aside the verdict on the second issue denying recovery of the penalty, and on the retrial of the second issue direct a verdict thereupon, on the same evidence, in plaintiff's favor. *Semble*, the court could have so answered this issue as a matter of law on the first trial. *Ibid.*

4. *Appeal and Error—Fragmentary Appeals—Separate Issues—Judgment—Verdict.*—Where the trial judge has set aside the verdict on one of the issues submitted, and after the retrial on the second issue appeal has been taken from a judgment on the whole case, it does not come within the objection under the decision of *Cement Co. v. Phillips*, 182 N. C., 440. *Ibid.*

5. *Appeal and Error—Presumptions—Burden of Proof—Prejudice.*—Error alleged on the trial in the Superior Court must affirmatively be shown by the appellant in the Supreme Court, with certainty that he has thereby been prejudiced or disadvantageously circumstanced before the jury, which does not sufficiently appear in this case to award a new trial. *McNinch v. Trust Co.*, 34.

6. *Appeal and Error—Juvenile Courts—Statutes—Courts—Rehearing.*—Petition to rehear this case, reported in 182 N. C., 44. *In re Hamilton*, 57.

7. *Appeal and Error—Instructions—Requests for Instructions.*—Where the controversy depends almost entirely upon the jury's determination of

APPEAL AND ERROR—*Continued.*

the facts from the evidence, an instruction is correct that the jury is the trier of the facts, with right to decide upon the truthfulness of the witnesses and the weight to give their testimony, and that it should carefully scrutinize the evidence, upon which the court had no opinion; and an exception in this case is untenable, in the absence of requests for specific instructions, that reversible error was committed by the court in leaving the jury insufficiently instructed and not applying the rule of evidence to the testimony. *Modlin v. Garrett*, 122.

8. *Appeal and Error—Newly Discovered Evidence—New Trials—Argument—Opinions.*—A petition filed in the Supreme Court for a new trial upon newly discovered evidence must be submitted without argument, and will be decided upon scrutiny of the affidavits without filing opinion. *Ibid.*

9. *Appeal and Error—Evidence—Agreement of Parties—Findings of Fact.*—Where the parties to the action have agreed that the trial judge shall find the facts on conflicting evidence, such findings, being supported by evidence, are binding and conclusive on appeal. *Daugherty v. Comrs.*, 149.

10. *Appeal and Error—Judgments—Fragmentary Appeals—Dismissal—Banks and Banking—Corporations—Receivers—Collateral—Collection—Trusts.*—A bank borrowed money from one of its correspondent foreign banks, and hypothecated certain local papers as security, which the correspondent bank sent back to the borrowing bank in trust to collect and apply the proceeds to the indebtedness. The borrowing bank became insolvent and a receiver was appointed for it, who, after notice and claims of creditors filed, refused the stated claim as a preference, and the court, passing upon the matter, sustained the exception and reserved judgment as to the other claims. There was evidence that the insolvent bank had collected some of the collateral, and had hypothecated other of the collateral to its note given to another bank for money borrowed: *Held*, the judgment rendered only as to this one claim was fragmentary, and will be dismissed. *Corporation Commission v. Trust Co.*, 170.

11. *Same—Record—Suggestions—Parties—Receivers—Reports.*—Upon this fragmentary and partially insufficient record, on appeal, and the case as presented thereon, the Supreme Court suggests that the second bank receiving the collateral sent for collection by the claimant bank be made a party to the suit; and that the report shows the amount of indebtedness to the bank claiming the preference, together with the entire amount of the collateral held by it as security for its indebtedness, and its value to the extent practicable. *Ibid.*

12. *Appeal and Error—Fragmentary Appeal—Dismissal—Cities and Towns—Condemnation.*—Where commissioners appointed to assess damages to land for appropriation for the purposes of a street make report, to which no exceptions are filed, and after the time for filing exceptions expires, the clerk, on motion of petitioner, renders judgment of nonsuit, which is reversed by the judge in term, an appeal by the petitioner is premature and fragmentary, and will not be entertained. *Goldsboro v. Holmes*, 203.

APPEAL AND ERROR—*Continued.*

13. *Appeal and Error—Trials—Evidence—Questions for Jury.—Held*, the evidence in this case presented only issues of fact for the jury to determine, and there was no prejudice to the appellant in the trial of the action. *Oil Co. v. Banks*, 204.

14. *Appeal and Error—Instructions—Statement of Contentions—Objections and Exceptions—Expression of Opinion—Statutes.*—Exceptions to the statement of the contentions of the parties by the trial judge in his charge to the jury, should be taken at the time, or at its conclusion, so as to afford him an opportunity to correct it, and the position of the appellant taken thereafter that it was done in such manner as an expression of opinion adverse to him, is untenable on this appeal from the facts appearing of record. *Dees v. Lee*, 206.

15. *Appeal and Error—Unanswered Questions—Negligence—Damages—Evidence—Dwellings—Values—Questions for Jury—Trials.*—Where the value of a building destroyed by fire is relevant to the inquiry in an action to recover damages, the value of another building which had theretofore stood on the same site, is competent as a circumstance to be considered by the jury, when there was evidence that the two were substantially identical with each other; but where the answer to the question is not given, the question will be held as harmless. *Peterson v. Power Co.*, 243.

16. *Appeal and Error—Verdict—Damages.*—The amount of the verdict for damages for the negligent killing of the plaintiff's intestate is not reviewable on appeal. *Tyree v. Tudor*, 340.

17. *Appeal and Error—Objections and Exceptions—Broadside Exceptions.*—Exceptions to the admission of evidence on the trial, which is correct in part, without specifying that which is objectionable, are too generally taken to be considered on appeal. *Sutton v. Melton*, 369.

18. *Appeal and Error—Evidence—Objections and Exceptions—Broadside Exceptions.*—Exceptions to testimony, to be considered on appeal, must not be to several distinct parts without particularly indicating the ground of objection. *Rutledge v. Mfg. Co.*, 430.

19. *Appeal and Error—Docketing—Dismissal—Certiorari—Court's Discretion—Consent.*—Where a case on appeal has not been docketed by appellant within the time required by the rule of practice in the Supreme Court regulating it, and a motion has not been duly made for a *certiorari*, it will be dismissed, it being discretionary with the court as to whether the motion for this writ will be allowed, which the consent of the parties cannot affect. *Mimms v. R. R.*, 436.

20. *Appeal and Error—Record—Findings—Equity—Mandatory Injunction.*—Where the Superior Court, having heard the matter, has granted a mandatory injunction without having formally found the facts upon which it had been issued, the matters involved being purely equitable, the Supreme Court, on appeal, may examine the evidence presented by the parties, form its own conclusions, and therefrom determine whether the plaintiff is equitably entitled to the relief sought. *Woolen Mills v. Land Co.*, 511.

21. *Appeal and Error—Harmless Error—Courts—Reversal of Verdict—Prejudice—New Trial.*—Where the trial judge has erroneously set aside the negative finding of the jury upon the issue of the statute of

APPEAL AND ERROR—*Continued.*

limitations, and answers this issue in the affirmative and dismisses the action, and it appears on appeal that the same result would have followed as a matter of law, the error will be held as harmless, without injury to the appellant, and a new trial will not be ordered. *Rankin v. Oates*, 518.

22. *Appeal and Error—Parties—Nonsuit—Partnership—Fragmentary Appeal.*—Where the Superior Court judge has ruled upon the trial of the case that certain other parties were necessary for the prosecution of the action on the ground that they had an interest in the subject-matter as partners, and that the cause could not proceed without them, the ruling strikes to the foundation of the plaintiff's cause of action, and he may take a voluntary nonsuit and appeal without valid objection that his appeal should be dismissed as fragmentary. *Baker v. Lumber Co.*, 577.

23. *Same—Railroads—Timber—Right of Way—Contracts—Cutting and Delivering Timber.*—The defendant railway company obtained a right of way through plaintiff's timbered lands, inaccessible to railway transportation, upon part consideration that the defendant would build the road and transport the plaintiff's timber at a certain price per carload. The defendant commenced to build the road and notified the plaintiff to have his timber hauled to the right of way, and the plaintiff then contracted with another to do the cutting and hauling upon consideration of advancements, and a certain part of the proceeds of the sale of the timber, without assigning any of his rights under the contract he had made with the defendant railroad company: *Held*, error for the trial judge to hold that the contractor for the cutting and hauling the timber was a partner in the contract sued on, and this ruling striking to the root of the plaintiff's alleged cause, he was within his right in taking a voluntary nonsuit and appealing from the ruling of the trial court. *Ibid.*

24. *Appeal and Error—Evidence—Objections and Exceptions—Harmless Error.*—In an action to recover damages for an injury alleged to have been caused the defendant's employee by a defective power-driven machine at which he performed his duties, evidence on the trial that the defendant, after the injury, rectified the alleged defect in conformity with arrangements used on other like machines for safety, is erroneously admitted; but the error is rendered harmless when the defendant itself has brought out this evidence later on the trial. *Ledford v. Lumber Co.*, 614.

25. *Appeal and Error—Legal Inferences—Process—Summons—Service.*—Where, as a conclusion of law upon the facts appearing, the judge of the Superior Court adjudges that summons against a corporation had been served according to the requirements of our statutes, it is subject to review on appeal to the Supreme Court. *Hatch v. R. R.*, 619.

26. *Appeal and Error—Facts Found by Trial Judge—Covenants—Breach—Deeds and Conveyances—Judgments.*—The plaintiff's covenantee was sued by the United States Government to recover certain lands alleging paramount title by prior deeds, of which the plaintiff and defendant in the present action for breach of warranty had notice, but neither became parties; and it was found by the trial judge whom the parties to the present action agreed should find the facts on the evi-

APPEAL AND ERROR—*Continued.*

dence, that the plaintiff and defendant were precluded by the former judgment: *Held*, upon the facts found it was not open for the defendant to contest the validity of the probates to the deeds under which the Government claims, and under which it has established its paramount title in the former action, in view of the decision of *Fibre Co. v. Cozad, ante*, 600. *Cover v. McAden*, 642.

27. *Appeal and Error—Reference—Consent Reference—Findings—Issues—Trial by Jury—Waiver.*—Where, under a consent reference, the parties waived their right to a trial by jury of the facts at issue, and one of them claimed title to the *locus in quo* by adverse possession, a finding by the referee, as a fact, upon supporting evidence confirmed by the court, that there has not been such possession, eliminates this question on appeal. *Dill v. Lumber Co.*, 661.

28. *Appeal and Error—Counterclaim—Demurrer—Fragmentary Appeals—Dismissal.*—Where there is neither verdict nor judgment upon the plaintiff's alleged cause of action, defendant's appeal from an order sustaining the plaintiffs' demurrer to a counterclaim set up in the answer, is fragmentary, and will be dismissed. *Teal v. Liles*, 678.

29. *Appeal and Error—Reference—Findings—Evidence.*—The facts found by the referee as to the result of an election in proceedings in the nature of a *quo warranto*, and approved by the trial judge, are not subject to review on appeal when supported by competent evidence. *S. v. Jackson*, 695.

30. *Appeal and Error—Reference—Courts—Findings—Evidence—Facts—Legal Inferences.* The trial judge may hear and consider exceptions to the referee's report, and make different or additional findings of fact, which are not reviewable on appeal unless there is no sufficient evidence to support them, or error committed in receiving or rejecting testimony upon which they are based, or some other question of law is raised with respect to such findings. *Ibid.*

31. *Appeal and Error—Reference—Elections—Findings—Fraud.*—The question of fraud in the returns of the county board of canvassers as to those voting in an election, in proceedings in the nature of a *quo warranto*, to determine the rights of contestants for a public office, is eliminated on appeal, when the report of the referee, approved by the trial judge, finds the absence of fraud, upon competent evidence. *Ibid.*

32. *Appeal and Error—Reference—Report of Referee—Findings—Exceptions—Counts.*—Where there are no exceptions filed to the findings of the referee, the trial judge may adopt them under the assumption that they are *prima facie* correct. *Ibid.*

33. *Appeal and Error—Presumptions—Burden of Proof.*—On appeal from the findings and judgment of the referee or the trial judge, in a contested election case, they are assumed to be *prima facie* correct, with the burden on the appellant to show the contrary. *Ibid.*

34. *Appeal and Error—Reference—Findings—Exceptions.*—Only such findings of a referee or of the trial judge as are excepted to by the appellant will be considered on appeal. *Ibid.*

35. *Appeal and Error—Elections—Exceptions—Reference—Findings—Immaterial Matter.*—Exceptions of the defendant, in a contested election

APPEAL AND ERROR—*Continued.*

case, that the testimony of certain voters was incompetent to impeach the result declared by the county board of canvassers, become immaterial on appeal, when it appears that the referee has found the absence of fraud and against the relator, under competent evidence, which was approved by the trial judge. *Ibid.*

36. *Appeal and Error—Reference—Conflicting Findings—Ultimate Facts—Evidence.*—The result declared by the county board of canvassers is *prima facie*, and presumptive evidence of its own correctness, and where the referee has sustained it, and this finding has been approved by the trial judge, the court on appeal cannot pass on the relative weight of the testimony or alleged inconsistencies of finding, but accept the ultimate findings as controlling. *Ibid.*

37. *Appeal and Error—Objections and Exceptions—Evidence.*—Exceptions to the ruling out of evidence admitted on the trial must be taken at the time, and they come too late to be considered on appeal when taken for the first time in appellant's statement of his case. *S. v. Kincaid*, 709.

38. *Appeal and Error—Evidence—Nonexpert—Opinion—Questions of Law—Trials.*—Whether the withdrawal of competent nonexpert evidence after its admission is prejudicial error is a question of law. *Ibid.*

39. *Appeal and Error—Objections and Exceptions—Instructions—Contentions.*—Exception to the statement of the contention of the parties entered after verdict comes too late to be considered on appeal. *Ibid.*

40. *Appeal and Error—Criminal Law—Objections and Exceptions—Evidence—Nonsuit.*—An exception to a motion to dismiss in a criminal action taken after the close of the State's evidence, and renewed by defendant after the introduction of his own evidence, does not confine the appeal to the State's evidence alone, and a conviction will be sustained under the second exception if there is any sufficient evidence on the whole record of the defendant's guilt. C. S., 4643. *S. v. Brinkley*, 720.

41. *Appeal and Error—Objections and Exceptions.*—An exception to the analysis of the contention of the parties in the court's instructions comes too late after verdict. *Ibid.*

42. *Appeal and Error—Objections and Exceptions—Assignment of Error.*—Exceptions to the trial must be properly set out in the assignments of error, to be considered on appeal, and it is insufficient if the assignment merely refers to the pages where the excluded evidence and the parts of the charge excepted to can be found. *S. v. Smith*, 726.

43. *Appeal and Error—Instructions—Contentions.*—The recital of the testimony of certain witnesses in the judge's charge to the jury is not objectionable, alone, as singling out the testimony of these witnesses or attaching special weight to it. *Ibid.*

44. *Appeal and Error—Verdict—Weight of Evidence—Motions—Court's Discretion.*—The refusal of the trial judge to set aside a verdict as being against the weight of the evidence is not reviewable on appeal. *Ibid.*

45. *Appeal and Error—Objections and Exceptions—Argument.*—Exceptions presented only in the argument of counsel before the Supreme Court will not be considered. *Ibid.*

APPEAL AND ERROR—*Continued.*

46. *Appeal and Error—Docketing Appeal—Certiorari—Motions—Laches.*—Whether the appellant has legal excuse in not docketing his case on appeal in time for it to be regularly heard at the call of the district to which it belongs is a matter for the Supreme Court to determine upon his docketing the record proper and moving for a *certiorari* under the rule. *S. v. Johnson*, 730.

47. *Same—Statutes—Discretion of Court—Case—Extension of Time.*—Where the appellant has not docketed the record proper and moved for a *certiorari* under the rules, he may not successfully resist appellee's motion to dismiss for not having his case docketed in the required time by attempting to show that such failure was caused by the trial judge in extending the time for the preparation and service of the case and counterclaim. *Semble*, an unreasonable time given for such purpose will not be recognized by the Supreme Court. *Ibid.*

48. *Appeal and Error—Instructions—Corrections—Objections and Exceptions.*—The Supreme Court may allow a correction in the case on appeal to make the record speak the truth when it is sufficiently made to appear that the trial judge will do so if afforded an opportunity, and thus render ineffectual an error assigned thereto, when the correction has been thus made. *S. v. Saleeby*, 740.

49. *Appeal and Error—Objections and Exceptions—Brief.*—Exceptions not insisted upon in the appellant's brief are deemed abandoned in the Supreme Court under the rule. *S. v. Montgomery*, 747.

50. *Appeal and Error—Objections and Exceptions—Instructions—Contentions.*—Exceptions to the statement by the trial judge of the contentions of the parties, in his charge to the jury, taken for the first time in the case on appeal, does not afford the judge trying the case an opportunity to correct error therein, if any committed, and will not be considered. *Ibid.*

51. *Appeal and Error—Prejudice—Remarks of Counsel—New Trials.*—Where upon the trial for the unlawful manufacture of liquor the court has told the solicitor it was improper for him to argue to the jury matters not in evidence, as that certain offenders carried spirituous liquors for a considerable distance into other states for the purpose of sale, the remarks of the solicitor thereafter that the jury all knew this was done, *is held* to be prejudicial to the defendant, entitling him to a new trial under the evidence of his case. *S. v. Evans*, 759.

52. *Appeal and Error—Habeas Corpus—Certiorari.*—No appeal to the Supreme Court lies upon the refusal of the judge, having jurisdiction, to release the petitioner in *habeas corpus* proceedings, except in cases concerning the care and custody of children, the remedy being by application for the writ of *certiorari* which lies in the discretion of the appellate court; and an appeal by the petitioner under sentence for contempt of court will ordinarily be dismissed. In this case, with the consent of the attorney-general, the court passes upon the appeal as if on *certiorari*. *S. v. Hooker*, 763.

53. *Appeal and Error—Objections and Exceptions—Instructions—Contentions.*—Exceptions to the statement of the contentions made by the trial judge in his charge to the jury, taken for the first time after

APPEAL AND ERROR—*Continued.*

trial, in the appellant's statement of the case on appeal, afford the trial judge no opportunity for correction, and are not reviewable. *S. v. Winder*, 777.

54. *Appeal and Error—Instructions—Contentions—Arguments—Reply of Judge—Harmless Error.*—Upon this trial of defendant for having liquor in his possession for the purpose of an unlawful sale: *Held*, the recitation of the solicitor's argument upon the waiver by defendant of his right to have the case removed to another justice of the peace for the preliminary hearing, was not to the defendant's prejudice, as the judge immediately and conclusively answered them, and fully protected his rights. *S. v. Sheffield*, 783.

55. *Appeal and Error—Dismissal—Rules of Court.*—In this case, *held* that the appeal be dismissed in the Supreme Court on motion of the State for the failure of the appellant to docket his case at the first term of this Court beginning after the trial below, or apply for a *certiorari* upon filing a transcript of the record proper, in accordance with the requirements of the rules of Court regulating such matters. *S. v. Barksdale*, 785.

56. *Appeal and Error—Rules of Court—Dismissal.*—A case on appeal will be dismissed in the Supreme Court when the appellant has not conformed to the rule requiring that it be docketed in a certain time before the call of the district, at the first term of the Supreme Court beginning after the trial, and has failed to apply for a *certiorari* on good cause shown. *S. v. Brown*, 789.

57. *Appeal and Error—Presumptions—Discharge of Jury—Conduct of Jurors—Remarks—Instructions.*—The remarks of the trial judge in discharging a jury after verdict, or in impressing upon jurors and the public the duty of jurors in their conduct, are *prima facie* presumed on appeal to be correct. *S. v. Pugh*, 800.

58. *Appeal and Error—Instructions—Verdict—Criminal Law—Homicide.*—Upon a trial for homicide, an instruction upon murder in the second degree, if erroneous, is cured by a verdict of manslaughter. *S. v. Hall*, 807.

59. *Appeal and Error—Criminal Law—Judgment—Arrest of Judgment—State's Right of Appeal—Statutes.*—Where as a matter of law judgment in a criminal action has been given for defendant upon arrest of judgment in the Superior Court, an appeal will lie to the Supreme Court in behalf of the State. C. S., 4649 (4). *Ibid.*

60. *Appeal and Error—Suspended Judgments—Case Remanded—Procedure.*—Where the Supreme Court has reversed the action of the Superior Court judge in imposing a sentence under a suspended judgment in a criminal action, for an insufficiency of finding as to the defendant's ultimate guilt, the judgment will be set aside and the cause remanded to be proceeded with according to law. *S. v. Hardin*, 817.

APPEARANCE. See Process, 3.

APPLIANCES. See Employer and Employee, 3, 10, 16.

APPLICATION. See Payment, 3.

APPROVAL. See School Districts, 2.

AGREEMENT OF COUNSEL. See Trials, 2, 5; Appeal and Error, 8, 45, 54; Courts, 5.

ARREST. See Negligence, 9; Intoxicating Liquor, 5, 9, 11; Criminal Law, 18; Homicide, 21.

1. *Arrest—Criminal Law—Homicide—Warrants—Identity of Defendant—Resisting Arrest—Justification of Prisoner.*—Where a sheriff has a warrant of arrest for persons unknown to him, he may in good faith inquire of persons whom he may meet as to their identity with the names in the warrant, and they are required to answer; and upon failure to give this information the persons suspected or questioned may not upon their own default therein justify the defense of an unlawful arrest. *S. v. Hall*, 807.

2. *Arrest—Criminal Law—Homicide—Instructions—Resisting Arrest—Appeal and Error.*—Where a sheriff is within his powers in making inquiries of defendants and arresting them for the purpose of identifying them as the ones for whom he holds a warrant, an instruction that the defendants had the right to use such force as reasonably appeared to them to be necessary in resisting an unlawful arrest, is favorable to the defendant, and is not a valid ground of exception. *Ibid.*

ARREST OF JUDGMENT. See Appeal and Error, 59; Homicide, 1; Judgments, 6, 7.

ASSAULT. See Homicide, 18.

ASSETS. See Dower, 1.

ASSESSMENTS. See Cities and Towns, 1, 6, 7, 8, 9; Benefit Associations, 2; Drainage Districts, 1, 2, 4.

ASSIGNMENT. See Mortgages, 1.

ASSIGNMENT FOR CREDITORS. See Receivers, 1.

ASSIGNMENTS OF ERROR. See Appeal and Error, 42.

ASSUMPTION OF RISKS. See Carriers, 18.

ATTACHMENT. See Carriers, 13; Judgments, 4.

1. *Attachment—Bonds—Principal and Surety—Statutes.*—Where judgment by default final has been rendered against the principal debtor and the surety on an attachment bond given in the action, in the form required by the statute, C. S., 815, to secure whatever judgment may be rendered, and the property attached has accordingly been retained by the debtor, the surety is concluded from asserting the insufficiency of the bond in not having another surety thereon, as the statute required, when the bond was given and accepted as he had intended, and he had not excepted thereto. *Thompson v. Dillingham*, 566.

2. *Attachment—Principal and Surety—Bankruptcy—Receivers—Title—Liens.*—Where a judgment by default final has been entered in an action against the same person, individually and as incorporated, for

ATTACHMENT—*Continued.*

the same debt, and the corporation has been adjudicated a bankrupt within the four-months period, and after the judgment the property of the individual has been placed in the hands of a receiver by the State court, the surety on the attachment bond will remain bound in the jurisdiction of the State court, notwithstanding the adjudication in bankruptcy, for the receiver takes title to the individual property subject to the existent lien by attachment, and the judgment upholding it. *Ibid.*

3. *Attachment—Action—Sheriffs—Wrongful Levy—Property of Another.*—In levying upon property in attachment, the sheriff is required to see that the property upon which he has levied is that of the defendant, and when he seizes the property of a stranger, it is a wrong done such third person, for which an independent action will lie; as to whether the owner of the property so seized could have resorted to an intervention or interpleaded in the attachment suit is not decided in this case. *Tatham v. DeHart*, 657.

4. *Same—Judgments.*—In an independent action against a sheriff to recover damages for his wrongful seizure in attachment of the plaintiff's property, instead of that of the defendant therein, where the property has been sold, the proceeds of the sale represents the property attached, to be held by the sheriff in the same plight and for the same purpose as the property would be if still held in his possession; and upon the failure of the plaintiff in the present suit to establish his right, a judgment for the defendant to the full value of the property is a proper one, not as damages personal to himself, but to be held subject to the process of attachment. *Ibid.*

ATTEMPT. See Criminal Law, 6.

ATTORNEY AND CLIENT. See Trials, 5.

1. *Attorney and Client—Trusts and Trustees—Attorney Deriving Adverse Title to His Client.*—The relation of an attorney to his client in regard to the subject-matter of litigation is one of great trust and confidence, and he may not acquire a title thereto or interest therein adverse to his client, or to his prejudice, without his client's consent, even though the attorney may have received no fee and intended no fraud; and where, in violation of the confidence of his client thus imposed, he acquires such title or interest, he will be decreed to hold it in trust for him. *Mebane v. Broadnax*, 333.

2. *Attorney and Client—Contracts—Fees—Evidence—Recovery—Questions for Jury—Trials.*—Where there is evidence tending to show that after an attorney had been engaged professionally by his client, they entered into an agreement as to the amount of compensation to be paid, owing to the fiduciary relationship of the attorney, the parties are not on equal terms; and the reasonableness of the amount agreed upon may be inquired into by the jury, upon the evidence; and an instruction that the client will be bound by their agreement, excluding an inquiry into the reasonableness of the fee, is reversible error. *Stern v. Hyman*, 182 N. C., 422, and *Casket Co. v. Wheeler*, 182 N. C., 459, cited and applied. *Abernethy v. Godette*, 673.

AUDITING. See Sheriffs, 4.

AUTHORITY. See Contracts, 21, 22.

AUTOMOBILES. See Liens, 4; Negligence, 1, 9, 21; Evidence, 19, 25; Criminal Law, 22.

1. *Automobiles—Negligence—Principal and Agent—Father and Son—Recklessness of Driver—Notice to Owner—Evidence.*—Where the owner of an automobile has authorized his 16-year-old son to drive therein a young girl of about the same age to a dance in the country, and there is evidence that his reckless driving has proximately caused her death, further evidence that the son had recently thereto been convicted of reckless driving in police courts, and that the father had arranged his fine, and also the reckless driving of the son on the occasion of the death, are competent as tending to show that the father had full notice of the recklessness of the son in driving automobiles, and of his own actionable negligence in permitting his son to use his automobile at the time in question. *Tyree v. Tudor*, 340.

2. *Automobiles—Negligence—Contributory Negligence—Evidence—Guests.* Where a young girl, something less than 16 years of age, has been killed by the reckless driving of her escort, about the same age, in returning at night from a dance, when the latter was intoxicated and racing with others on the country improved highway, striking another car and deflecting his own, while going about sixty miles an hour, through a wire fence, taking down several posts and throwing his car bottom upwards in a field, the previously expressed desire of the deceased to return at a fast speed and her desire to get home before her friend who was staying with her, so that her mother would not suppose she was riding after the dance had ended, is not sufficient to sustain the defense of contributory negligence, or bar the plaintiff's right of recovery. *Ibid.*

3. *Same—Acquiescence.*—For a young girl riding in an automobile as a guest to have imputed to her the negligence of the driver, upon the issue of contributory negligence, there must be sufficient evidence that she had control over the machine or over the acts of the driver, and her acquiescence in the method or manner of his driving is not alone sufficient. *Ibid.*

4. *Automobiles—Speed Limits—Cities and Towns—Statutes—Ordinances.*—Town ordinances regulating automobiles, speed limits, etc., within the town in conflict with the statutes on the subject, C. S., 2599, 2618, are void under the provisions of C. S., 2601, and apart from the express provisions of the last named section, they must yield to the statute law of the State, such powers being a delegated legislative function. *S. v. Freshwater*, 762.

5. *Automobiles—Statutes—Criminal Negligence—Evidence—Manslaughter—Criminal Law.*—Upon a trial for manslaughter alleged to have been caused by the defendant's criminally and recklessly driving an automobile upon a public highway under circumstances prohibited by statute, there was evidence tending to show that the deceased, being driven by his son in another automobile, on the proper side of an improved road, twenty-two feet wide, was rounding a curve near an embankment on the outside of the road, when the prisoner and others, in an intoxicated condition, going in the opposite direction, with unobstructed view, ran across from inside of the road where he should have remained, and with fifteen feet to spare, collided with the auto-

AUTOMOBILE—*Continued.*

mobile in which the deceased was riding, causing his death: *Held* sufficient to sustain a verdict of conviction. C. S., 2617, 2618; *S. v. Rountree*, 181 N. C., 535, cited and applied. *S. v. Jessup*, 771.

6. *Same—Intoxication.*—Where there is evidence that the defendant by his criminal recklessness in driving his automobile on a public highway, prohibited by statute, collided with that in which the deceased was riding, causing his death, testimony as to the intoxicated condition of other men in the automobile with him at the time, together with the fact that some of them had whiskey, and the defendant's effort to borrow money to enable his brother to buy whiskey, with direct evidence of the defendant's intoxicated condition, is competent as a part of the *res gestae* to show the defendant's opportunity to obtain whiskey at the time, and the purpose to have it on this occasion. C. S., 2617, 2618. *Ibid.*

BAIL. See Negligence, 9.

BAILMENT. See Contracts, 3.

BANKS AND BANKING. See Appeal and Error, 10; Injunction, 8; Payment, 4.

1. *Banks and Banking—Deposits—Checks—Principal and Agent—Signature.*—Upon the plaintiff sending money for deposit in the bank by W., the bank opened an account in the plaintiff's name and issued its pass book to her, and agreed, without the knowledge or consent of the plaintiff, that the checks should be signed in the plaintiff's name by W., and on these checks, so written and signed, the money was withdrawn from the bank to the plaintiff's loss: *Held*, there being neither express or implied authority given by the plaintiff to W., to check out the money, as stated, the defendant bank is liable to the plaintiff for her loss. *Goodloe v. Bank*, 315.

2. *Banks and Banking—Checks—Indorsement—Fraud—Indebitatus Assumpsit—Statutes.*—Where the maker of a check, whether a bank or other corporation, or an individual, fills out the blank spaces by writing in ink and delivers it to the payee as a complete instrument, there is no question of implied agency of the payee to do anything further regarding the negotiation of the instrument as the agent for the maker, and where the payee has fraudulently raised the amount of the check, endorses to another, and receives the money thereon, the maker is not liable to the endorsee except in an action for the original or true amount of the check, upon equitable principles, and allowed by our negotiable instrument law. C. S., 3160. *Bank v. Bank*, 463.

3. *Same—Equity—Innocent Persons—Principal and Agent—Trusts.*—The equitable principle that where one of two innocent persons must suffer, the law will cast the loss upon him who has put it in the power of another to do the injury, ordinarily arises in instances of fraud or breaches of trust involved in the contract of agency, where one clothed with the real or apparent authority to act for another in the premises has in excess or breach of the authority given, acted to another's injury; and not to instances wherein the maker of a check has filled in the blank places with ink, has signed the same and delivered it to the payee as a completed instrument, and the payee has

BANKS AND BANKING—*Continued.*

raised the check to a larger amount, without the assent of the maker, and has fraudulently obtained cash thereon from another, by endorsement. *Ibid.*

4. *Same—Negligence—Sensitized Paper Erasures—Protectographs—Contracts—Tort.*—Where completed checks issued by a bank upon its regular form of checks has been signed by its proper officer, raised by the payee, and endorsed to and cashed by another bank, which brings action against the maker bank for the full amount of the altered checks, the failure of the maker bank to use sensitized paper to prevent chemical erasures and a protectograph, with perforated figures, to prevent fraudulent alterations, is too remote to afford the basis of an action either in tort or contract, or to be considered the proximate cause of the injury, upon an issue of negligence; and the plaintiff is confined to his action for the true amount for which the checks were originally made. C. S., 3106. *Ibid.*

5. *Same.*—The equitable principle upon which the indorsee of a check which has been raised by the payee without the maker's assent, is only permitted to recover from the maker upon an *indebitatus assumpsit*, extends to banking institutions, to individual makers, or general business concerns. C. S., 3106. *Ibid.*

6. *Banks and Banking—Federal Reserve Bank—Nonmember Bank—Par Clearance.*—By amendments, the Federal Reserve Act, under which the various Federal Reserve Banks were organized, was changed to allow these banks to receive from their member banks checks and drafts on nonmember banks within their respective territory, so as to perfect their reserve system, and it is required that no charge for the payment of the checks and drafts, and the remittances therefor by exchange or otherwise, shall be made against the Federal Reserve Bank: *Held,* while nonmember banks within the territory may require these papers to be presented at their institutions to receive the full amount of their face in money, they are without authority to remit for checks sent them by exchange drafts, and in consideration of their waiver of direct presentation demand a discount and thus remit a less amount. *Bank v. Bank,* 546.

7. *Same—State Statutes—Conflict of Laws—Constitutional Law.*—A state statute which permits a nonmember of a Federal Reserve Bank to pay by draft, upon its exchange deposit, a note or draft for collection sent through the Federal Reserve Bank and charge a fee for the remittance, being in conflict with the Federal Reserve Act, is not enforceable, the latter act controlling under the provisions of the U. S. Constitution, Art. VI., sec. 2, and the laws made in pursuance thereof, in effect that the Federal Constitution and statutes shall be the supreme law, and binding upon the judges in every state, anything in the State Constitution and State laws to the contrary notwithstanding. *Ibid.*

BANKRUPTCY. See Attachment, 2.

BENEFICIAL ASSOCIATIONS. See Evidence, 16.

1. *Beneficial Associations—Insurance—National Councils—Local Councils—Principal and Agent—Corporations.*—Where the national council of a fraternal order, authorized by its charter "to establish, maintain,

BENEFICIAL ASSOCIATIONS—*Continued.*

control, and regulate a department for the payment of funeral benefits to the members of the order," operated over an extensive territory through local councils, such local or subordinate councils are agents of the national council for the purposes expressed in its charter. *Evans v. Junior Order*, 358.

2. *Same—By-Laws—Assessments—Forfeiture.* Where the national council of a fraternal order writes funeral benefits through its local councils under the provisions of its charter and by-laws adopted in pursuance thereof, the agency thus created is not affected by the provisions of a by-law of the national council under which the local council forfeits its membership by not remitting assessments collected within stated intervals, as against the rights of the beneficiary under a policy of a deceased member enrolled by the local council, who has died in good standing therein with his assessments duly paid. *Ibid.*

BENEFITS. See Cities and Towns, 2; Principal and Agent, 1.

BILLS AND NOTES. See Injunction, 8; Mortgages, 1; Criminal Law, 3; Escrow, 1.

BOARDS. See School Districts, 1.

BONDS. See Constitutional Law, 8, 10, 12; School Districts, 3, 17; Roads and Highways, 3; Attachment, 1; Estates, 10.

BOUNDARIES. See Trespass, 3; Deeds and Conveyances, 17.

1. *Boundaries—Evidence—Streams—Adverse Possession—Limitation of Actions—Trespass—Deeds and Conveyances—Color of Title.*—Defendant's trespass upon the lappage of land between the descriptions of the boundaries in the plaintiff's and defendant's deed, claimed by adverse possession by the defendant, was made to depend upon the location of a divisional line called for in the plaintiff's deed as cornering in a log road at or near the east edge of Long Branch, but not calling for the run of the branch, and in the defendant's deed as "beginning at a black jack in Yarborough's corner, and runs with his line to McQueen's line, thence as said line," etc.: *Held*, evidence was competent in defendant's behalf which tended to show that McQueen's line was a straight one running near the branch, and under this evidence it was for the jury to determine the true dividing line upon the question of defendant's color; and that it was not a presumption of law, under this evidence, that the true dividing line ran with the run of the branch. *McQueen v. Graham*, 491.

2. *Boundaries—Evidence.*—Where the true dividing line between the plaintiff and defendant is in dispute in an action of trespass, it is competent for a witness to testify as a fact within his own knowledge as to whether the line claimed by the defendant is in conformity with the description in the plaintiff's deed cornering the line at or near a certain stream, and running thence with its eastern edge, etc. *Ibid.*

3. *Same—Lappage—Adverse Possession—Color—Limitation of Actions.*—Where the defendant claims the lands in dispute, which in an action of trespass is made to depend upon his adverse possession under color of title of a lappage between the description of a boundary in his own deed, and that of the plaintiff, even though the plaintiff may have

BOUNDARIES—*Continued.*

shown a superior paper title, he may recover by showing actual and sufficient adverse possession under his own deed as color of title, as against the constructive possession of the plaintiff. *Ibid.*

4. *Same—Court Surveyor.*—It is competent for a surveyor appointed by the court to plat the land in dispute to show the contentions of the parties in an action for trespass involving the question of lappage of the lands, to state that he obtained the location of the beginning corner upon the information given him by an adjoining owner, who was examined as a witness, and, at most, it would be harmless error in this case, as the corner was not found and the evidence could not affect the result. *Ibid.*

5. *Same.*—Where an action of trespass depends upon the lappage of lands claimed by the parties, it is competent for a witness, testifying as a fact from his own knowledge, to state that the defendant's deed covered the *locus in quo*, or as to the true location of defendant's boundary. *Ibid.*

6. *Boundaries—Deeds and Conveyances—Acreage—Evidence.*—Where the question of defendant's trespass depends upon the question of lappage between the lines called for in the plaintiff's and defendant's deeds, evidence that the acreage given in the plaintiff's deed would be greatly increased if the divisional line were located according to his contention, is relevant as a circumstance in the defendant's favor, though ordinarily the acreage is no part of the description, and the latter will control, unless the lines or boundaries are in doubt. *Ibid.*

7. *Same—Court Surveyor.*—It is competent for a surveyor appointed by the court, who has platted the contention of the parties to an action of trespass upon lands, depending upon a lappage, to testify to the actual acreage called for by the description in the plaintiff's deed, when otherwise competent and relevant to the inquiry. *Ibid.*

BREACH. See Deeds and Conveyances, 6, 7, 10; Instructions, 5; Landlord and Tenant, 5, 7, 8, 9; Limitation of Actions, 4; Appeal and Error, 16; Pardons, 3.

BRIEFS. See Appeal and Error, 49.

BROKERS. See Contracts, 8, 10.

BURDEN OF PROOF. See Limitation of Actions, 5; Criminal Law, 21; Homicide, 6, 17; Intoxicating Liquor, 18; Appeal and Error, 5, 33; Negligence, 2, 5, 16, 22; Carriers, 6, 14; Executors and Administrators, 7; Instructions, 5.

BURNINGS. See Railroads, 2.

BY-LAWS. See Beneficial Associations, 2.

CANCELLATION. See Mortgages, 1, 3; Instructions, 3.

CARNAL KNOWLEDGE. See Evidence, 26.

CARRIERS. See Statutes, 3; Judgments, 1; Instructions, 6.

1. *Carriers—Railroads—Action—Consignee.*—The consignees of a shipment by common carriage are ordinarily the ones for whose benefit

CARRIERS—*Continued.*

it was made and are entitled to maintain an action upon the contract, the question of title being dependent upon the intention of the parties. *Watts v. R. R.*, 12.

2. *Same—Order, Notify—Statutes.*—The person to be notified on shipment to order of consignor has, under our statute, C. S., 313, title for the purpose of a suit to recover damages and the statutory penalty, as fully as if the carrier had contracted with him direct, upon the presentation of the bill of lading properly endorsed and his tender thereof in good faith to the carrier, the statute being remedial of the common law that there was no contractual relation between him and the carrier that would permit recovery for causes accruing before he had paid the draft, and had the bill of lading assigned to him. C. S., 290, 337. *Ibid.*

3. *Carriers of Goods—Express Companies—Failure to Deliver—Negligence—Evidence—Prima Facie Case—Nonsuit—Instructions.*—Where an express company receives as a common carrier a package containing money to be transported and delivered to a firm of which the sender is a member, evidence that the carrier failed to deliver it is *prima facie* evidence of its negligence, carrying the case to the jury for its determination in the sender's action, and a motion as of nonsuit, or instruction in the defendant's favor thereon, is properly denied. *Morris v. Express Co.*, 144.

4. *Same—Fraud—Constructive Fraud.*—While a carrier may avoid liability for accepting a package by reason of the shipper's misrepresentation to its agent as to its kind or quality, upon the principle of actual or constructive fraud in the making of the contract, if actual fraud there should ordinarily be a false statement of some essential fact, knowingly made and reasonably relied on by the agent or the carrier, as an inducement to the contract of carriage; or, if constructive fraud, the silence of the consignor and the circumstances of the transaction must in fact and effect be the equivalent of a fraudulent misrepresentation. *Ibid.*

5. *Same—Misrepresentations of Shipper—Mistake of Agent—Damages.*—The railroad agent received from the consignor a box containing money change, and there was evidence tending to show that the consignor told this agent it contained money change, but that the agent understood him to say "chains" or "automobile chains," and as such this agent delivered the package to the express agent when he returned, who sent it as "automobile chains," though the box was too small for a shipment of that character, which the express agent himself doubted at the time. In either event the express rate was the same, and it appearing that the package was never delivered: *Held*, sufficient to support a verdict of the jury awarding damages to the plaintiff, to the extent of the value given, and upon the evidence sustaining it. *Ibid.*

6. *Same—Exceptions—Proximate Cause—Burden of Proof.*—Except for the act of God, the common enemy, or default attributable to the shipper, a common carrier is held liable as insurer of goods it accepts for transportation and delivery, and where the carrier relies on an exception to the general rule it must show that the exception was the proximate cause of the injury; and where it is shown that an express company has accepted goods for shipment and has failed to deliver

CARRIERS—*Continued.*

them, according to the contract of carriage, a *prima facie* case of its negligence is established, and a motion as of nonsuit, or a prayer directing a verdict upon the evidence, is properly refused. *Ibid.*

7. *Carriers—Express Companies—Freight Receipts—Money—Bullion—Negligence of Carrier—Damages.*—A clause of an express receipt for an interstate shipment, the form of which has been approved by the Interstate Commerce Commission, excusing the carrier from liability when the package contained money, bullion, and it is not so stated in the receipt, except in case of loss due to carrier's negligence, does not by its express terms include loss proximately caused by the carrier or its agent when the evidence and verdict has established a loss due to such negligence. *Ibid.*

8. *Carriers of Goods—Negligence—Evidence—Failure to Deliver—Common Carriers.*—Where the transportation of a box of Merchandise has been made under a bill of lading for interstate shipment over connecting lines of common carriage, evidence that the box was empty when delivered to the consignee is sufficient evidence of negligence to take the case to the jury in an action to recover damages from the delivering carrier. *Moore v. R. R.*, 213.

9. *Carriers of Freight—Connecting Lines—Negligence—Common-law Liability—Common Carriers.*—The common-law liability of one of several connecting carriers is ordinarily limited to negligence over its own line, with the burden of proof upon the plaintiff in the action to show facts and circumstances which change or affect such liability. *Ibid.*

10. *Same—Contracts—Partnership.*—At common law a carrier was liable for loss or damage to a shipment of goods while in its possession with the duty to deliver it without damage to the next succeeding carrier, except for causes not due to the act of God, the fault of the shipper or the inherent nature or quality of the goods; and in the absence of any contract or partnership agreement between the carriers, or constitutional or statutory provision to the contrary, a common carrier is not required to transport goods to a point beyond its line; and whether such carrier is the initial, intermediate, or terminal one, it is ordinarily liable at common law only for such loss or damage as results from its own negligence. *Ibid.*

11. *Same—Federal Statutes—Commerce—Principal and Agent.*—Under the provisions of the Federal statutes applying to interstate shipments of goods by a connecting line of carriage, the Carmack amendment to the Hepburn law, the receiving carrier is considered as having made a through contract, with liability for loss or injury occurring from negligence of any of the connecting lines over which the shipment may pass, as well as for loss or injury occurring on its own line, on the principle that each connecting carrier is made the agent of the receiving carrier; but where the delivering carrier is sued for the loss of a shipment, and it is established that the loss occurred on the line of the receiving carrier, a recovery may not be had for such loss against the terminal carrier. *Ibid.*

12. *Carriers of Goods—Common Carriers—Connecting Lines—Contracts—Partnership—Negligence.*—By a special contract or partnership relation, connecting lines of common carriers between themselves may

CARRIERS—*Continued.*

make the receiving, intermediate, or terminal carrier, or all of them, liable for loss or injury to a shipment upon whatever line the actionable negligence may occur. *Ibid.*

13. *Carriers of Freight—Connecting Lines –Negligence—Damages—Actions Claim and Delivery—Attachment—Tender of Charges—Appeal and Error.*—The consignee of an interstate carrier of goods, in his action for damages thereto against the delivering carrier, sued out an attachment, and this carrier replevied, C. S., 830, 836; and thereafter the plaintiff sued out a writ of attachment in his action against the foreign, initial carrier, and the delivering carrier, and it appears that upon the trial both actions and the proceedings thereunder were consolidated and dismissed for the failure of the plaintiff to plead or prove a tender of payment of freight, war tax, and demurrage: *Held,* the plaintiff not having abandoned the shipment, and not suing for its full value, but for damages alleged to have been caused by the carrier's negligence, should have been permitted to proceed on his claim therefor, though not entitled to the immediate possession of the shipment. *Lumber Co. v. R. R.*, 179 N. C., 359; *Whittington v. R. R.*, 172 N. C., 501, cited and applied. *Bradshaw v. R. R.*, 264.

14. *Carriers of Goods—Railroads—Failure to Deliver—Burden of Proof—Nondelivery Station.*—Where a shipment of goods is delivered to a railroad company for transportation, the title vests in the consignee, with the duty resting upon the carrier on the arrival of the goods at destination to notify the consignee and make delivery or show legal excuse for its default. C. S., 3516. And this principle applies to a side-station when notification of arrival should have been given from a nearby station, and the inquiring consignee was there misinformed as to the arrival, and the car in the meanwhile was broken into and the shipment stolen. *Mfg. Co. v. Tucker*, 303.

15. *Same—Verdict—Judgments.*—Where it is established by the jury that a consignment of goods was carried to the delivering point by the carrier, its failure to deliver to the consignee, or to notify him, and the goods are lost while in its possession, the verdict is incomplete when there was no issue submitted as to whether the carrier, who is a party to the action, was in default in not delivering it to the consignee, and a judgment thereon against the consignee is reversible error, entitling the consignee to a new trial. *Ibid.*

16. *Carriers of Goods—Express Companies—Commerce—Federal Law—Written Notice—Damages—Condition Precedent.*—Upon the express receipt of an interstate shipment of goods by the carrier was a stipulation requiring, among other things, that in order to make the carrier liable for the loss of the shipment, a claim must be made and presented in writing to the originating or delivering carrier within four months after the delivery of the property, or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed, etc.: *Held,* the Federal statute and the authoritative Federal decisions thereon afford the exclusive rule of the carrier's liability in such cases, and thereunder the filing of the written claim within the stated time is upheld as a reasonable stipulation requiring a compliance with its terms as a condition precedent to a recovery. *St. Sing v. Express Co.*, 405.

CARRIERS—*Continued.*

17. *Common Carriers—Railroads—Master and Servant—Employer and Employee—Negligence—Commerce—Statutes — Federal Employers' Liability Act.*—Evidence that the plaintiff, an experienced brakeman of a railroad company engaged in interstate commerce, was thrown between a box and a flat car, while, in the course of his employment, he was crossing from the one to the other with the train in motion, by a sudden and unexpected jerking of the train, of such force as to break his hold upon the box car and jerk the flat car from under his feet; and that the cars had been picked up at a station they had left without inspection of the cars or drawheads is sufficient for the determination of the jury upon the issue of actionable negligence, in an action against the carrier to recover damages under the Federal Employers' Liability Act. *Bass v. R. R.*, 444.

18. *Same—Assumption of Risk.*—The doctrine of assumption of risk, though not wholly abolished by the Federal Employers' Liability Act, has no application where the negligence of a fellow-servant, which the injured party could not have foreseen or expected, is the sole, direct, and immediate cause of the injury, the risks assumed by the employee being only those incidental to the proper and careful operation of the railroad. *Ibid.*

CARRIERS OF GOODS. See Carriers.

CARRIERS OF FREIGHT. See Carriers.

CASE. See Appeal and Error, 47, 60.

CAUSES OF ACTION. See Evidence, 9; Partition, 1.

CAVEAT. See Wills, 1, 2, 3.

CERTIFICATE OF CLERK. See Deeds and Conveyances, 8.

CERTIFICATE OF DEPOSIT. See Injunction, 8, 9.

CERTIORARI. See Habeas Corpus, 1, 2; Appeal and Error, 19, 46, 52.

CHARACTER. See Evidence, 10, 11, 24, 27, 29; Intoxicating Liquor, 22.

CHECKS. See Banks and Banking, 1, 2.

CHILDREN. See Actions, 1; Deeds and Conveyances, 2; Estates, 1; Negligence, 10, 13; Evidence, 26.

CITIES AND TOWNS. See Appeal and Error, 12; Negligence, 11; Eminent Domain, 10, 13; Municipal Corporations, 1; Automobiles, 4.

1. *Cities and Towns—Railroads—Street Improvements—Assessments—Statutes—Municipal Corporations.*—The property of railroad companies abutting upon the streets of a city is liable to assessments for the paving and improvements thereon to the same extent as that of private owners, in proper instances, and where proper legislative authority is therefor shown. *Kinston v. R. R.*, 14.

2. *Same—Benefits—Necessity of Improvements.*—Where an act allows assessments to be made by a city on property abutting on a street for pavements or improvements thereon, the legislative declaration on the

CITIES AND TOWNS—*Continued.*

subject is conclusive as to the necessity and benefit of the proposed improvements, and in applying the principle and estimating the amount as against the owners, individual or corporate, the court may interfere only in case of palpable and gross abuse. *Ibid.*

3. *Same—Constitutional Law—Necessaries—Elections.*—A city, authorized under a private act to issue bonds for street pavements and improvements and to assess the lands of owners abutting on the streets improved upon the approval of its voters, issued the bonds, assessed the owners accordingly, and finding it had insufficient funds, proceeded, under the provisions of C. S., 2703, 2704, to assess the lands of a railroad company abutting upon streets paved and improved for its proportional part of the costs in accordance with the method prescribed by the statutes: *Held,* the general statutes expressly included railroads within its provisions as to assessments, the only question involved, and improvements of this character coming within the definition of "necessaries," the assessments made under the general law against the abutting land of the railroad company are valid and enforceable; especially, as in this case, where the railroad company has acquired the fee-simple title to the land. *Ibid.*

4. *Same—Private Acts.*—The general statutes authorizing cities and towns to issue bonds and assess abutting lands for improving and paving streets, and not requiring that the questions be submitted to the voters, are additional and independent of special or local laws (C. S., 2704), and where the latter require the question to be first submitted to the voters for their approval, and these requirements have been fully met, under the private act, transactions thereunder complete and their validity unquestioned, a railroad company may not resist an assessment made under the general law, C. S., 2703, 2704, upon the ground that the provisions of the private acts, requiring the approval of the voters, control the question of the validity of the assessments. *Bramham v. Durham,* 171 N. C., 196, cited and distinguished. *Ibid.*

5. *Same—Ratifying Statutes.*—Where a city or town has proceeded under private acts to issue bonds and assess the lands of abutting owners for street paving and improvements, and for insufficiency of funds thus expended find it necessary to assess the lands of a railroad company abutting on streets so improved, C. S., 2703, 2704, a later act ratifying the private acts, evidently for the purpose of curing apprehended defects and to make the bonds a more safe and desirable investment, cannot affect the validity of the proceedings under the general laws. *Ibid.*

6. *Cities and Towns—Municipal Corporations—Railroads—Leases—Assessments—Street Improvements—Primary and Secondary Liability.*—While local assessments of abutting land upon city streets for paving and improvements are not regarded as taxes in the sense of a general revenue measure, they are referred to the power of taxation possessed and exercised by Government and held to be a special tax. Hence, where a railroad company has leased a railroad for 99 years, and has subleased it to another, and the lessee road has covenanted to protect the lessor "from payment of taxes of any nature whatsoever," *it is held,* while both of the railroad companies are liable for the assessment, that of the lessor is a primary one, though a covenant against assessments of this character has not specifically been made. *Ibid.*

CITIES AND TOWNS—*Continued.*

7. *Cities and Towns—Municipal Corporations—Leases—Lessor and Lessee—Street Improvements—Assessments—Liens—Priority of Lien.*—It is within the authority of the Legislature to make assessments against the lands of a railroad company abutting on streets improved by a city a paramount lien on its franchise and property, not requiring that such lien be given in express terms if by correct interpretation the statute intends that it shall be conferred, and when so conferred, the lien will necessarily be construed as being superior to all others. *Ibid.*

8. *Cities and Towns—Municipal Corporations—Assessments—Liens—Priorities of Liens—Taxes—Foreclosure—Actions—Statutes.*—Where private acts of a Legislature gives a city the right to enforce assessments on lands abutting upon its improved streets as a lien against the property: and the city has, independently, under the general law, assessed the abutting land of a railroad company and its franchise, C. S., 2717, providing that if the "lien is not paid when due it shall be subject to the penalties now provided as in case of unpaid taxes": *Held*, the lien so created is superior to all other liens and incumbrances, and may be enforced by decree of sale of the property and franchise of the railroad company. C. S., 3462, 3463. *Ibid.*

9. *Cities and Towns—Municipal Corporations—Street Improvements—Statutes—Assessments—Priorities.*—The provisions of C. S., 2713, that assessments made against abutting lands on streets paved or improved, shall be "from the time of the assessment and confirmation thereof, a lien superior to any and all liens and encumbrances," does not exclusively refer to subsequent liens; and the reference to the date of confirmation is only to fix the time when the lien is conclusively established, and when so established it takes the precedence over all liens then existent or otherwise. *Ibid.*

CLAIM AND DELIVERY. See Carriers, 2.

CLASS REPRESENTATION. See Actions, 1.

CLERKS. See Receivers, 1.

CLERKS OF COURT. See Eminent Domain, 3, 11; Removal of Causes, 2, 3; Judgments, 5; Pleadings, 6; Deeds and Conveyances, 12, 14.

CLOUD ON TITLE. See Costs, 1; Trespass, 1.

COLLATERAL. See Appeal and Error, 10; Mortgages, 4.

COLLATERAL AGREEMENT. See Judgments, 16.

COLLECTION. See Appeal and Error, 10.

COLOR OF TITLE. See Boundaries, 1, 3; Limitation of Actions, 1.

COMBINATION. See School Districts, 11, 15.

COMMERCE. See Carriers, 11, 16, 17; Railroads, 4.

COMMISSIONERS. See Contracts, 8; Drainage Districts, 2; Partition, 1, 3; Deeds and Conveyances, 14.

COMMISSIONS. See Contracts, 10; Partition, 3.

COMMON CARRIERS. See Carriers.

COMMON LAW. See Liens, 1; Carriers, 9; Contempt, 2; Courts, 8.

COMPARATIVE NEGLIGENCE. See Railroads, 1; Negligence, 19.

COMPENSATION. See Eminent Domain, 4; Sheriffs, 1.

COMPROMISE AND SETTLEMENT. See New Trials, 3.

1. *Compromise and Settlement—Contracts—Consideration.*—The plaintiff was injured while in the course of his employment for the defendant, causing, among other things, the amputation of his arm, and while preparing to bring suit for damages upon the alleged negligence of the defendant, was approached by the defendant's superintendent or foreman in charge and control of its employees, who suggested a compromise upon condition that the defendant would give him employment such as he was then capable of doing, and pay him a living wage for the support of himself and family for life: *Held,* the compromise being an adjustment of a *bona fide* claim, is a sufficient consideration to support the agreement thus made, whether it was well grounded or not. *Fisher v. Lumber Co.,* 485.

2. *Same—Employer and Employee—Master and Servant—Principal and Agent—Ratification.*—A contract by way of compromise to give employment at a living wage to an employee, sufficient for himself and his family, whose arm had been amputated as a result of an injury alleged to have been caused by the defendant employer's negligence, is too unusual to come under the ordinary powers of a foreman or of an agent of more general powers, but may become binding by the knowledge or acquiescence of the owner; as where the defendant employer was a manufacturing plant, mostly owned by one person, who was aware of the injury, and that his company paid the expense incident thereto, and for years kept this crippled employee on the payroll and paid him the same wages that he had received before the injury, these circumstances being sufficient to impute knowledge to the management of the defendant's plant of the contract agreed upon by its boss or foreman. *Ibid.*

COMPOUNDING A FELONY. See Criminal Law, 4.

CONDEMNATION. See Eminent Domain, 1, 10, 11, 13, 15; Appeal and Error, 12; Roads and Highways, 1.

CONDITIONAL RIGHT. See Actions, 5.

CONDITIONS. See Railroads, 6, 7; Carriers, 16; Limitation of Actions, 6; Criminal Law, 18; Pardon, 1, 3.

CONDUCT. See Appeal and Error, 57; Courts, 9.

CONFIRMATION. See Deeds and Conveyances, 11.

CONFLICT OF LAWS. See Railroads, 5; Banks and Banking, 7; Courts, 4.

CONNECTING CARRIERS. See Carriers, 9, 12, 13.

CONNOR ACT. See Mortgages, 5.

CONSENT. See Appeal and Error, 19, 27.

CONSIDERATION. See Vendor and Purchaser, 22; Criminal Law, 3; Deeds and Conveyances, 3; Compromise and Settlement, 1.

CONSIGNOR AND CONSIGNEE. See Judgments, 1; Carriers, 1.

CONSOLIDATED STATUTES.
113 (6). Sec. 859.
Sec.
160. Year's period to bring action for wrongful death is not a statute of limitation requiring it to be pleaded; service in this case *held* not to have avoided lapse of statutory time, and insufficiency not cured by defendant's appearance. Sec. 404-475. *Hatch v. R. R.*, 617.

290. The carrier is liable to person to be notified in "order, notify" shipment. *Watts v. R. R.*, 12.

313. The carrier is liable to person to be notified in "order, notify" shipment. *Watts v. R. R.*, 12.

313. Remedial statute to permit person to be notified to maintain action against the carrier in "order, notify" shipment. *Watts v. R. R.*, 12.

360. School districts are incorporated and given powers in relation to issuing bonds, when approved by the voters; and the word "trustees" includes the principal or governing body. *Paschal v. Johnson*, 129.

370. Section does not bar equitable counterclaim under the facts of this case. *Shell v. Lineberger*, 440.

395. This section does not affect section 445. *Pierce v. Faison*, 177.

404, 475. Issuance of summons, unserved, is not the commencement of the action in contemplation of section 160. *Hatch v. R. R.*, 617.

411. Where the local prohibition act prescribes the offense of "feloniously" selling liquor, an indictment omitting the word "feloniously" is under the general statute. *S. v. Jackson*, 696.

413. Section does not extend the period of time for cutting and removing timber from land under a timber deed. *Gatewood v. Fry*, 416.

415. Plaintiff, after nonsuit, must pay cost to entitle him to bring new action under this section. *Rankin v. Watts*, 517.

435. When an open square has been dedicated and accepted by a municipal corporation, an instruction that if a railroad company had held seven years adverse possession, etc., under a later deed, it would acquire title, is error. *R. R. v. Dunn*, 427.

437 (2). Outstanding title in government to lands conveyed by deed to individual amounts to an eviction, and the statute of limitation begins at once to run, without the necessity of grantee's entry and eviction. *Cover v. McAden*, 641.

445. This section is not affected by section 395. *Pierce v. Faison*, 177.

457. An action for damages against vendor of land under contract to convey, or recovery of purchase price is a waiver of right to specific performance; and where there are two purchasers, both should be parties. *Kendall v. Realty Co.*, 425.

463. Action to set aside sale of lands and cancel notes given for purchase price secured by mortgage should be brought in county where land is situated. *Vaughan v. Fallin*, 318.

CONSOLIDATED STATUTES—*Continued.*

SEC.

469, 470, 637. Proper venue for nonresident's action for breach of contract is defendant's place of residence. *Cotton Oil Co. v. Grimes*, 97.

473. Trial judges may have jurors summoned from adjoining counties, etc., in refusing defendants' motion to remove the cause in murder case. *S. v. Kincaid*, 709.

564. Instructions held not to be a violation of this section. Statute in derogation of common-law rule, and meaning will not be extended beyond its terms. *S. v. Pugh*, 800.

591. Trial judge may not change verdict and dismiss action as a matter of law. *Rankin v. Oates*, 517.

591. A reasonable discretion is exercised by trial judge in setting verdict aside tó accomplish equitable results. *Bailey v. Mineral Co.*, 525.

595. Complaint in this case is sufficient for judgment by default final. *Thompson v. Dellingham*, 566.

602. Purchase price by shipment may be recovered in action against carrier when lost by carrier's negligence, where Director General is party. *Mfg. Co. v. Tucker*, 303.

621. A commissioner to sell land at private sale may reopen the matter by petition, after confirmation, and show that the purchaser had not paid a further sum agreed upon, and not included in the price confirmed. *Lyman v. Coal Co.*, 581.

637. See sec. 469.

706, 714, 3668, 3669, 3746. As to excluding dwellings, etc., from power to condemn lands for highways do not apply to private statute not excepting them. *Clifton v. Highway Commission*, 211.

708. Testimony of reckless driving of automobile causing injury is sufficient of willful injury under the evidence of this case. *Weathers v. Baldwin*, 276.

815. Surety on replevy bond may not object for insecurity in not having two thereon, when it was as he agreed it should be. *Thompson v. Dillingham*, 566.

830, 836. Not necessary for consignor of goods to tender payment of freight, war tax and demurrage to carrier in action to recover damages and not possession of shipment. *Bradshaw v. R. R.*, 264.

859, 860, 113 (6). No preference is given to clerk hire before appointment of receiver. *Mfg. Co. v. Turnage*, 137.

889. A motion of nonsuit should not have been granted under the facts of this case, upon conflicting evidence as to an outstanding life estate affecting chain of title to land by adverse possession. *Howell v. Shaw*, 460.

935, 3305. A woman may act as notary on married woman's acknowledgment of deed, and pass on probate as deputy clerk of Superior Court. *Preston v. Roberts*, 62.

978, 985. The classified common-law distinctions of acts of contempt of court, done within and without its immediate presence, is preserved by these sections and the distinctions defined. *Snow v. Hawkes*, 365.

CONSOLIDATED STATUTES—*Continued.*

SEC.

981, 983. Acts of prisoner under the facts of the case was direct contempt of court, authorizing imprisonment not exceeding $250. or both, in discretion of justice of the peace. *S. v. Hooker*, 763.

1113. Corporations organized under this section may condemn lands for a public turnpike or toll road. *Retreat Asso. v. Development Co.*, 43.

1243. The plaintiff sought to recover from his brother one-half of lands under a deed to himself and brother. Defendant claimed the whole under a prior deed. Jury found for plaintiff, and defendant appealed from being taxed with cost: *Held*, error. *Hare v. Hare*, 419.

1609, 1618, etc. No preference is given for clerk hire preceding voluntary assignment for benefit of creditors. *Mfg. Co. v. Turnage*, 137.

1665, 1667. Amount allowed wife under this section is within sound discretion of the judge; it may be subsequently modified or vacated; it is not technical "alimony," may be secured from husband's estate or made a charge against him, or secured in trust, and property will revert to him on her death or reconciliation; it may include income from his property or earnings. *Anderson v. Anderson*, 139.

1705. Land for a turnpike or toll road is for a public use and may be condemned by a corporation existing under the general law. *Retreat Association v. Development Co.*, 43.

1714. A nuisance sensibly impairing value of lands comes within the intent of this section. *Selma v. Noble*, 323.

1717. Power given to cities to condemn lands as railroad companies does not extend to dwellings. *Selma v. Noble*, 322.

1720. The want of power of a turnpike company to condemn private lands should be taken by answer before the clerk. *Retreat Association v. Development Co.*, 43.

1734, 1737. An estate to "bodily heirs" and in the event of none to grantor's estate creates a shifting use and upon the non happening of the contingency goes to the grantor's heirs. *Willis v. Trust Co.*, 267.

1743. Plaintiff is chargeable with costs of suit to remove cloud on title to lands upon defendant's disclaimer. *Clemmons v. Jackson*, 382.

1744. Grantors of land affected with contingent interests may make the former deed valid by afterwards conforming to the requirements of this section. *Meyer v. Thompson*, 543.

1744. Interest of remote contingent remainderman is preserved by sale of land under this section; and may be sold at public or private sale, requiring a bond. *Poole v. Thompson*, 588.

1795. Beneficiary under a will may testify as to the manner the deceased kept the paper-writing among his valuable papers, etc. *In re Harrison*, 457.

1795. A wife may testify that she was unaware that her deceased husband had made a will in her favor. *In re Bradford*, 4.

2180. Foreign guardian, when complying with secs. 2195, 2196, may have ward's land sold under this section. *Cilley v. Geitner*, 528.

CONSOLIDATED STATUTES—*Continued.*

SEC.

2195, 2196. A foreign guardian complying with sections may withdraw ward's personal estate from the jurisdiction of our courts. *Cilley v. Geitner*, 528.

2435. This is in addition to common-law lien given artisans, is superior to vendor's or mortgage liens, and attaches when the mortgagor is in legal possession of an automobile upon which the work has been done at his instance. *Johnson v. Yates*, 24.

2480, 2481. Agricultural liens are superior to all others except landlords or laborer's liens. *Williams v. Davis*, 90.

2513. There must be an express or implied promise by husband for wife to recover compensation for services rendered to him in his business. *Dorsett v. Dorsett*, 354.

2515. The failure of the probate officer to make required certificate of wife's deed to her husband, may not be cured by the officer after the wife's death. *Smith v. Beaver*, 497.

2594 (1). The assignment of a mortgage note alone transfers no title to mortgage property and power to foreclose canceled mortgage of record remains with mortgagor. *Bank v. Sauls*, 165.

2599, 2601, 2618. Speed ordinances of cities are void when in conflict with general provisions of the statute. *S. v. Freshwater*, 762.

2617, 2618. Evidence held sufficient for conviction, as also evidence of intoxication of driver of automobile, causing the injury, as a part of the *res gestae*. *S. v. Jessup*, 771.

2703, 2704. Where assessments for street improvements have been found inadequate, a city may assess railroad property therefor under the general statutes, independently of a private act, requiring the question to be first submitted to approval of voters; and a later statute ratifying the private act does not affect the matter. *Kinston v. R. R.*, 14.

2717. Valid assessments against railroad right of way for street improvements is a lien superior to other liens and encumbrances. *Kinston v. R. R.*, 14.

2799. Collecting garbage from stores and dwellings by city is a governmental duty, and city is not liable for negligence of employees. Charging owners with cost of service is not a business for pay. *James v. Charlotte*, 630.

3305. The fiat of registration by clerk of Superior Court of some county within the State is necessary under our registration law. *Fibre Co. v. Cozad*, 600.

3106. Endorser of a completed check of maker can only recover of latter the original amount of a raised check, upon an *indebitatus* assumpsit. *Bank v. Bank*, 463.

3160. The payee has no implied agency except for negotiation of a completed check, fully filled out by the maker. *Bank v. Bank*, 463.

3362. Section cannot impair vested rights of grantees in deeds to lands. *Fibre Co. v. Cozad*, 600.

CONSOLIDATED STATUTES—*Continued.*

SEC.

3367. Possession of 150 gallons of grape wine is not alone sufficient for conviction. *S. v. Hardin*, 815.

3667, 1715. Under statutory provisions the State Highway Commission may take gravel, etc., from private lands before instituting condemnation proceedings. *Jennings v. Highway Commission*, 68.

3379. Carrying eight quarts liquor to a house of another makes out *prima facie* case, and is sufficient to convict of unlawful sale and transportation. *S. v. Simmons*, 684.

3409. Indictment not charging a former offense of manufacturing, etc., presumes no former conviction. *S. v. Clark*, 733.

3409. Instructions to scrutinize testimony of witnesses interested with defendant in criminal action, is not error, together with charge to give it same weight as other evidence if jury was satisfied of its truth. *S. v. Smith*, 725.

3462, 3463. Liens for assessments against railroad right of way for street improvements are enforcible by sale of railroad property. *Kinston v. R. R.*, 14.

2713. The superiority of liens for street improvements is from the time of the "assessment and confirmation thereof." *Kinston v. R. R.*, 15.

3467. Doctrine of comparative negligence is recognized only in instances within the provisions of this act and the Federal Employers' Act, and in mitigation of damages. *Moore v. Iron Works*, 438.

3467. Contributory negligence in employee's action for damages against railroad company, will not justify nonsuit. *Lamm v. R. R.*, 74.

3379. Possession of 150 gallons of grape wine manufactured on owner's premises is not *prima facie* evidence of his guilt. *S. v. Hardin*, 815.

3516. Common carrier is now liable for penalty for failure to deliver shipment. *Mitchell v. R. R.*, 162.

3524. Judge may set aside verdict on issue denying penalty and retain that on issue of actual damages. *Hussey v. R. R.*, 8.

3668 *et seq.* See sec. 706

3836. A special local law giving the right of outlet over adjoining lands with regard to convenience of existing one under certain conditions, etc., prevails over the provision of this section. *Farmer v. Bright*, 655.

4131. Evidence of undue influence as to a will made before marriage is no evidence of such influence as to a will subsequently made. *In re Bradford*, 4.

4202. Testimony of girl under 14, that she had told her mother of the circumstance on the day the defendant had carnally known or abused her, is competent as corroborative by her other testimony. *S. v. Winder*, 776.

4338, 4339. In woman's civil action for damages for seduction, it is not required that the intercourse was procured under promise of marriage, as in the criminal action; and recovery may be had upon her unsupported testimony. *Hardin v. Davis*, 46.

CONSOLIDATED STATUTES—*Continued.*

SEC.

4480. Allegation and proof of fraud are necessary to the validity of this section. *Minton v. Early*, 199.

4543, 4544. No powers are conferred on national prohibition officer making an arrest by the provisions of these sections. *S. v. Burnett*, 703.

4617. Where indictment fails to charge a former offense of manufacturing, etc., no former conviction is presumed. Sec. 3409; *S. v. Clark*, 733.

4640. An attempt to commit a crime is an indictable offense and sufficient to convict if accompanied by an overt act to carry out the conceived intent. *S. v. Addor*, 687.

4643. Motion to nonsuit criminal action on State's evidence, renewed after all the evidence, does not confine the appeal to State's evidence. *S. v. Brinkley*, 720.

4649 (4). State may appeal from judgment rendered as a matter of law. *S. v. Hall*, 806.

4697. Chemical analysis showing deficiency of fertilizer necessary in action to recover damage to crops caused by its use. *Jones v. Guano Co.*, 338.

5469. County board of education may combine local school districts when no change is made in existing rate of taxation. *Paschal v. Johnson*, 129.

5473. This section as amended is constitutional except as to taking new territory into a school district that has not voted upon the proposed special tax. *Perry v. Comrs.*, 387.

5511, 5530. New territory taken into existing school tax districts under combination into one must vote upon proposed tax. Sec. 5511, not applicable. *Perry v. Comrs.*, 387; *Hicks v. Comrs.*, 394.

5526. Refers to new territory where no special school tax has been voted upon. *Perry v. Comrs.*, 387; *Hicks v. Comrs.*, 393.

5526, 5530. Construed *in pari materia*, and held reconcilable. *Hicks v. Comrs.*, 394.

5530, 5531. First section relates to abolishing an old school tax district when a part of a new consolidated district; the latter to the abolition of an existing district. *Hicks v. Comrs.*, 394.

5560. Territory taken into new district formed with existing district having a special tax, must vote upon proposed tax. *Hicks v. Comrs.*, 394.

5676 *et seq.* A local law will prevail as an exception to the general law, allowing issue of bonds at a specified rate of interest. *Wilson v. Comrs.*, 638.

5678, 5681. A later act may cure irregularities under Constitution, Art. II, sec. 14. *Board of Education v. Comrs.*, 300.

5768 *et seq.* This statute emphasizes the mandate of Constitution, Art. IX, as to six months public school. *Lacy v. Bank*, 373.

5960. Those within the county were not entitled to vote as absentees, prior to the amendment of 1919. *S. v. Jackson*, 696.

CONSOLIDATED STATUTES—*Continued.*

SEC.

5986. In *quo warranto*, the declared result of the election by county board of canvassers is taken as *prima facie* correct. *S. v. Jackson*, 695.

7642. The Governor may revoke conditional pardon on defendant's admissions, or such evidence as he may require. *S. v. Yates*, 753.

8051. Penalties are not recoverable against sheriff for mere failure to pay over amount claimed to be due by him. *S. v. Gentry*, 826.

CONSOLIDATION. See School District, 1, 5, 6.

CONSPIRACY. See Homicide, 5, 7, 8, 10.

CONSTITUTION OF NORTH CAROLINA.

ART.

I, sec. 16. Statute making tenant abandoning crop and one hiring him guilty of a misdemeanor must require allegation and proof of fraud to be valid. *Minton v. Early*, 199.

II, sec. 29. Incorporating several existing school tax districts is not the creation of a new district, in relation to valid taxation and bond issues. *Paschal v. Johnson*, 130.

II, sec. 29. Establishing additional recorder's courts to number heretofore established is not a local law prohibited by the Constitution. *In re Harris*, 633.

II, sec. 14. A later statute may cure irregularities under this article of Constitution. *Board of Education v. Comrs.*, 300.

II, sec. 14. A legislative committee's substitute to an original bill is regarded as an amendment, and when passed by both branches upon separate days, upon roll call bill, it is a compliance with the Constitution. *Edwards v. Comrs.*, 58.

IV, sec. 8. Appeal in *habeas corpus* proceedings, except as to custody of children does not lie; remedy is by *recordari*. *S. v. Yates*, 753.

IV, sec. 18. Salaries of judges may not be decreased by taxation thereof during term of office. *Long v. Watts*, 99.

IV, sec. 23. Magistrates' jurisdiction herein defined does not apply to proceedings in direct contempt of court. *S. v. Yates*, 753.

V, sec. 4. Cannot affect mandatory requirements of Article IX, sec. 3 as to six months school term. *Lacy v. Bank*, 373.

VII, sec. 7. A woman may act as notary on acknowledgment of married woman's deed, and also act thereon as deputy clerk of the Superior Court, C. S., 935, 3305. *Preston v. Roberts*, 62.

VII, sec. 7. Does not apply to the six months school term made mandatory under Art. IX. *Lacy v. Bank*, 373.

VII, sec. 7. The principle that special school-tax districts may not levy a tax, except for necessaries, without approval of voters, does not extend to the provisions of Const., Art. IX. *Ibid.*

VII, sec. 7. New territory incorporated into existing school tax districts under C. S., 5530, must vote upon proposed taxation. *Perry v. Comrs.*, 387.

CONSTITUTION—*Continued.*

ART.

IX. The mandatory requirement for six months public school does not deprive courts of jurisdiction to inquire into statutory abuse of legislative power. *Lacy v. Bank*, 373.

IX, secs. 1, 2, 3 are mandatory in requiring a six months term of public schools by statute; and the counties are governmental agencies for the purpose. *Lacy v. Bank*, 373.

X, sec. 1 and 2. Allowance for support of wife is not property from which husband may claim exemption. *Anderson v. Anderson*, 139.

CONSTITUTIONAL LAW. See Banks and Banking, 7; Pleadings, 6; Elections, 2; Habeas Corpus, 2; Larceny, 2; Procedure, 1; Cities and Towns, 3; Courts, 7; Eminent Domain, 4; School Districts, 1, 5, 6; Criminal Law, 1; Marriage, 1; Roads and Highways, 1.

1. *Constitutional Law—Statutes—Taxation—Ratifying Acts—Retroactive Acts—Vested Rights.*—The Legislature, having the power to authorize a county to levy a special road tax for the purpose of coöperating in the construction of State or National highways in the county, may validate, by retroactive legislation, an attempt of the municipal authorities to levy this tax after the expiration of the period fixed in the prior act, when in the ratifying act there is no attempt to legalize prior legislation, or a prior invalid seizure or sale of property thereunder, or to interfere with vested rights. *Edwards v. Comrs.*, 58.

2. *Constitutional Law—Statutes—Taxation—Reading of Bill—Substitute Bill—Separate Days—Roads and Highways.*—Where a bill authorizing a levy of taxes for road purposes has been read, referred to a committee, and the committee has recommended a substitute, resulting in the tabling of the original bill and the passing of the substitute on two separate days in that branch of legislation, and otherwise conforming to the requirements of Const., Art. II, sec. 14, as to the "aye" and "no" vote, etc., and its passing on separate days, etc., in both branches of legislation, the substitute is to be regarded, in the contemplation of the Constitution, as an amendment to the original bill introduced, and the act may not successfully be questioned as not having passed on the several separate days required of a bill of this character. *Ibid.*

3. *Constitutional Law—Taxation—Incomes.*—The authority given to the Legislature by the Constitution of 1868 to tax salaries, incomes, etc., is not affected or repealed by the amendment of 1920, but thereunder additional power is given to tax incomes when the property from which the same is derived is taxed, except in prohibited instances. *Long v. Watts*, 99.

4. *Same—Salaries—Judges.*—The constitutional restriction on the Legislature not to diminish salaries of the judges during their continuance in office is still in force, unaffected or disturbed by the amendment of 1920, and though their income from other sources may be taxed, a tax on their salaries during their term of office is to diminish their income from such source in contravention of the express terms of the Constitution, Art. IV, sec. 18, further indicated by Art. I, sec. 8, providing that "the legislative, executive, and supreme judicial powers of the Government ought to be forever separate and distinct from each other." *Ibid.*

CONSTITUTIONAL LAW—*Continued.*

5. *Same—Courts—Appeal and Error.*—It is the duty of the Supreme Court to pass upon the rights of one of the judges of the State as a citizen thereof, when he, in a case properly presented, denies the constitutional right of the State or one of its designated agencies, to tax his salary paid to him as one of its judges, as being in contravention of Art. IV, sec. 18, prohibiting the Legislature from diminishing the salaries of the judges during their continuance in office. *Ibid.*

6. *Same—Increase of Salary.*—An increase of the salaries of the judges during a term of office is the fixing of their salary by the Legislature in such amount as in its judgment is a proper compensation for their services, and an attempt by an agency of the Legislature, either under actual or mistaken authority, to impose a tax thereon is an attempt to diminish these salaries during the term of office. *Ibid.*

7. *Same—Intent—Interpretation of Statutes.*—The statute taxing salaries and incomes generally is presumed to have been passed with the knowledge by the Legislature of the constitutional inhibition to diminish the salaries of the judges during their continuance in office, also of the decisions of our courts thereon and the policy of the State in respect thereto, as gathered from the organic law; and where the statute is silent on the subject, the legislative intent will not be construed to authorize its designated agent to diminish such salaries by the imposition of a tax thereon, whether regarded as a tax upon an income or otherwise. *Ibid.*

8. *Constitutional Law—Municipal Corporations—Local Laws—Taxation—Bonds.*—Laws 1921, ch. 133, sec. 4, among other things incorporating existing local school districts for all purposes relating to the issuance or payment of bonds upon the approval of the voters of a district, is valid, independent of section 1 thereof, and not in contravention to our recent constitutional amendment, Art. II, sec. 29, prohibiting the incorporation of new school districts by special legislative enactment. *Trustees v. Trust Co.*, 181 N. C., 306, cited and distinguished. *Paschal v. Johnson*, 130.

9. *Constitutional Law—Statutes—Retroactive Laws—Vested Rights—Curative Statutes.*—Where a statute is void only because of a neglected omission of formal constitutional requirements, and is of a subject-matter within its authority, the observation of these requirements in a later act amending the first one cures the defect therein and gives validity thereto, in the absence of intervening rights to the contrary. *Board of Education v. Comrs.*, 300.

10. *Same—Schools—Bonds—County Commissioners.*—In a suit by the commissioners of a school district within a county under the provisions of C. S., 5681, to compel county commissioners to deliver to it certain school bonds for negotiation that the voters of the district had approved at an election held according to the statutory provisions affecting them, it appeared that the issue was in the sum of $75,000, or $50,000 in excess of the amount authorized by C. S., 5678, and that the original act had not been passed in accordance with the requirement of our Constitution, Art. II, sec. 14, but was later ratified by the Legislature in conformity therewith. There being no intervening vested rights: *Held,* the former infirmity of the bonds was cured by the later act, and a judgment in favor of the plaintiffs was a proper one. *Ibid.*

CONSTITUTIONAL LAW—*Continued.*

11. *Constitutional Law—Contracts—Fertilizer—Statutes.*—C. S., 4697, requiring that no damages to or a shortage of crops may be recovered when resulting from the use of fertilizer sold for the purpose of raising them, except after chemical analysis showing deficiency of ingredients, where no claim that the sale is prohibited by statute or that the sale was dishonest or of fraudulent goods, does not impair the right of contract, and is constitutional and valid. *Fertilizer Works v. Aiken*, 175 N. C., 402; *Fertilizer Co. v. Thomas*, 181 N. C., 274, cited and approved. *Jones v. Guano Co.*, 338.

12. *Constitutional Law Schools —Statutes—Bond Issues—Terms of School —Governmental Agencies—Counties—State-wide Systems of Schools.*—The provisions of our Constitution, Art. IX, secs. 1, 2, 3, are mandatory that the Legislature provide by "taxation and otherwise for a general and uniform system of public education, free of charge, to all of the children of the State from six to twenty-one years," etc., and for the continuance of the school term in the various districts for at least six months in each and every year, recognizing the counties of the State and designating them as the governmental agencies through which the Legislature may act in the performance of this duty and in making its measure effective. *Lacy v. Bank*, 373.

13. *Same—State Aid to Counties.*—Chapter 147, Laws of 1921, passed under the provisions of Article IX of our State Constitution, with a view of providing a special building fund to enable the counties of the State to properly maintain a six-months school term, authorizing and directing the State Treasurer to issue $5,000,000 coupon bonds of the State, sell the same, and from the proceeds advance to the several counties of the State a proportionate amount from time to time for the purpose of enabling such counties to acquire sites, and to provide buildings, equipping, repairing the public school buildings, etc., adequate and necessary to maintain a six-months school, is for the maintenance of a State-wide school system required of the State Government and imposed as a primary duty on the State itself by express provision of the Constitution. *Ibid.*

14. *Same—Faith and Credit—Election—Vote by the People.*—Article V, section 4, of our State Constitution, prohibiting the General Assembly from "lending the credit of the State in aid of any person, association, or corporation, except to aid the completion of railroads unfinished at the time of the adoption of the Constitution, or in which the State has a direct pecuniary interest, unless by a vote of the people," is an inhibition on giving or lending the credit of the State to third persons, individual or corporate, and of the kind contemplated in the provision; and cannot be construed to affect the mandatory provisions of Article IX of the State Constitution as to the maintenance of a State-wide school system by legislative enactment. *Ibid.*

15. *Constitutional Law—Interpretation.*—A constitution must be construed on broad and liberal lines to give effect to the intention of the people who have adopted it, and must be considered as a whole and construed to allow significance to each and every part, if this can be done by fair and reasonable intendment. *Ibid.*

16. *Same—Schools—Faith and Credit—Election—Vote of Electors.*—Our State Constitution, Art. VII, sec. 7, prohibiting counties, etc., or other

CONSTITUTIONAL LAW—*Continued:*

municipal corporations from contracting debts or levying taxes except for necessary expenses, unless approved by a majority of the qualified voters therein, refers to debts and taxes in furtherance of local measures, and do not extend to the provisions of Article IX, relating to a State-wide statutory measure to enable the various counties to maintain six-months terms of public schools, by borrowing and returning a State fund created for the purpose, and in accordance with the constitutional express recognition of the counties as the governmental units through which the general purpose may be effected. *Ibid.*

17. *Same—Necessary Expenses.*—The principle upon which the incurring of debts, levying of taxes by counties, or other municipal corporations for public schools are not to be regarded as necessary expenses within the meaning of Article VII, section 7, of the Constitution, and requiring the submission of the question to and the approval of the voters before obligations of this kind are valid, relate to cities or towns or special school districts, or to the purpose of providing means for maintaining schools for a longer period than the constitutional term, or to some school in a special locality has no application to a State-wide school system created under a general act passed in pursuance of Article IX of the Constitution. *Ibid.*

18. *Constitutional Law—Statutes—State System of Schools—Courts—Jurisdiction.*—While it is held that chapter 147, Laws of 1921, providing for a bond issue to aid the counties in building and equipping the schoolhouses necessary for the accommodation of the pupils for a six-months term of school, is a reasonable and valid exercise of the legislative power under Article IX of the Constitution, emphasized by C. S., 5758 *et seq.*, passed in pursuance of section 15 thereof, making it an indictable offense where there is a willful failure to attend the public schools, the principle announced does not withdraw from the scrutiny or control of the court cases where the exercise of the legislative authority has been arbitrary and without limit as to the amount; or where the school authorities depart from any and all sense of proportion and enter on a system of extravagant expenditure, clearly amounting to manifest abuse of the powers conferred. *Ibid.*

19. *Constitutional Law—Ambiguity—Local Laws—Courts—Statutes—General Statutes—Inferior Courts.*—The amendment of our State Constitution, effective 10 January, 1917, now appearing as Article II, section 29, of the Constitution, among other things, prohibiting "local, private, or special legislation relating to the establishment of courts inferior to the Supreme Court," etc., must be defined by reference to the context and existing conditions, and is sufficiently ambiguous to admit of interpretation; and as applied to the establishment of recorder's courts, the court will take cognizance of the efficiency and the number of such courts theretofore existent; and the more recent statutes under which other such courts have been added, and at the time of the enactment of the original statute affecting the question there were 56 counties in the State within which they have been established, with only 44 counties to the contrary, in determining whether an amendment to a recent statute permitting several additional counties to establish them comes within the constitutional inhibition as a local law. *In re Harris*, 633.

CONSTITUTIONAL LAW—*Continued.*

20. *Same—Presumptions.*—The interpretation of a statute, as to whether it is a local one, prohibited by Article II, section 29, of our Constitution, under the recent amendment, should be largely left to the facts and circumstances of each particular case, giving significance to the rule that legislative acts are presumed to have been rightfully passed from proper motives, and that a classification of this kind, when made by them, should not be disturbed unless it is manifestly arbitrary and invalid. *Ibid.*

21. *Same—Amended Statutes.*—A general law permitting the establishment of recorder's courts in the State, excepting certain counties to the number of 44, leaving 56 within the provisions of the statute, is not a local law within the intent and meaning of Article II, section 29, of our Constitution (a recent amendment), nor is a late statute amending the former general law taking a certain county and two others out of the excepted class enumerated in the general statutes, unconstitutional as a local or special act as to those counties, the effect of this statute being a reënactment of the general law including the particular counties. *Ibid.*

CONSTRUCTION. See Statutes, 1; Instructions, 8; Courts, 8.

CONSTRUCTIVE FRAUD. See Trusts, 2, 3; Carriers, 4.

CONTEMPT. See Courts, 6.

1. *Contempt—Courts.*—Contempt of court is not only a willful disregard or disobedience of its orders, but such conduct as tends to bring the authority of the court and the administration of the law into disrepute, or to defeat, impair, or prejudice the rights of witnesses or parties to pending litigation. *Snow v. Hawkes,* 365.

2. *Same—Common Law—Classification—Statutes.*—Contempt of court is classified at common law as direct contempt, or words spoken or acts done in the presence of the court tending to defeat or impair the administration of justice, and consequential or indirect or constructive contempt, having a like tendency, done at a distance, and not in the presence of the court, and is preserved with its distinction by our statute, C. S., 978, 985, in the former of which the offender may be instantly apprehended and dealt with, and in the latter by a rule issued based upon affidavit requiring the suspected party to show cause why he should not be attached; and in either instance the guilty person may be suitably punished. *Ibid.*

3. *Same—Inherent Powers—Legislative Powers.*—The power to punish for either direct or indirect contempt is inherent in the court as necessary to its exercise of its other powers, and is a part of the fundamental law which the Legislature can neither create nor destroy. *Ibid.*

4. *Same—Jurisdiction—Culminating Effect.*—Where a defendant has been liberated on bail by a bond given by himself with his father as surety, in plaintiff's action to recover damages for the seduction of his daughter, and in proceedings as for indirect contempt it is found as a fact by the Superior Court judge hearing the same that the respondent, the defendant's father, meeting the plaintiff in another state, procured his written agreement to have his pending suit dismissed

CONTEMPT—*Continued.*

through fear of arrest and imprisonment: *Held,* the act of the respondent in obtaining the writing under illegal duress, was punishable as for indirect contempt of court; and he having submitted to the jurisdiction of the court wherein the action was pending, the unlawful scheme, though originating in another state, was coextensive with the illegal purpose culminating in our court, and there punishable. *Ibid.*

CONTENTIONS. See Instructions, 8, 11, 13; Appeal and Error, 39, 43, 50, 53, 54.

CONTINGENCIES. See Husband and Wife, 8.

CONTINGENT INTERESTS. See Actions, 1; Deeds and Conveyances, 11.

CONTINGENT REMAINDERS. See Wills, 5, 9; Estates, 4, 6, 10.

CONTINUANCE. See Injunction, 14; Process, 1.

CONTRACTS. See Injunction, 2; Landlord and Tenant, 5, 7; Liens, 2; Marriage, 1; Vendor and Purchaser, 2; Carriers, 10, 12; Leases, 1; Criminal Law, 2, 3; Evidence, 7; Escrow, 1; Instructions, 3, 5; Appeal and Error, 23; Banks and Banking, 4; Compromise and Settlement, 1; Deeds and Conveyances, 6, 7, 9; Husband and Wife, 9; Constitutional Law, 11; Limitation of Actions, 4; Parties, 1; Pleadings, 3; Partition, 1; Payment, 1, 4; Principal and Agent, 1; Public Service Corporations, 1; Attorney and Client, 2.

1. *Contracts—Options—Verbal Agreements—Lands—Statute of Frauds—Pleadings—Admissions.*—A verbal option of lands will not be declared void by the courts, as a matter of law, under the statute of frauds requiring a writing, when the party to be charged admits the alleged contract, in accordance with its stated terms, and resists performance upon entirely separate and distinct matters. *Arps v. Davenport,* 72.

2. *Contracts—Custom.*—A usage or custom to be taken as a part of a contract entered into by the parties, when not excluded by its express terms, must be reasonable, but, when fully established, its reasonableness will not be questioned, and the parties will be considered as having agreed to it, and it becomes binding on them as a part of their contract. *McDearman v. Morris,* 76.

3. *Same—Instructions—Warehouseman—Bailment—Rule of Prudent Man—Appeal and Error—New Trials.*—Where there is evidence of an established custom among warehousemen for the sale of leaf tobacco and the buyers on the warehouse floor, that the former insure the tobacco sold for the benefit of the latter until the buyers should have had a reasonable time in which to remove it, and this is the only question at issue, under conflicting evidence, an instruction which confuses this issue with the obligation of the rule of the prudent man, under the circumstances, or the duty of the warehousemen as bailees, is substantial error to the prejudice of the warehousemen, upon which a new trial will be ordered on appeal. *Ibid.*

4. *Contracts—Vendor and Purchaser—Breach—Evidence—Questions for Jury—Trials.*—In the vendor's action to recover the difference between

CONTRACTS—*Continued.*

the contract price of a carload shipment of potatoes and that obtained after he had taken possession and sold them to others upon the breach by the purchaser in refusing to accept the shipment, where the evidence is conflicting, a charge of the court making the defendant's liability to depend upon whether he had refused the shipment without just or legal cause is not erroneous. *Merrill v. Tew*, 172.

5. *Same—Inspection—Resale by Vendor—Damages.*—In an action by the vendor of a carload of potatoes for its purchase price arising from the wrongful refusal of the defendant to receive it upon alleged breach of contract, the exception of defendant that the potatoes were to be inspected before the contract should become binding cannot be maintained on appeal, when, under the charge of the court and the evidence, the jury have found against his contention. *Ibid.*

6. *Contracts—Breach—Vendor and Purchaser -Damages—Resale.* —Where the defendant has breached his contract in not receiving a carload of potatoes from the delivering carrier, and the purchaser has taken possession for the purpose of selling them, he is only required to take due precaution to prevent damage to the purchaser in disposing of the shipment to others, or not to increase them beyond those that would naturally and reasonably result from the purchaser's breach, and which were within the contemplation of the parties in making the contract. *Ibid.*

7. *Same—Place of Resale.*—Where the purchaser has breached his contract in refusing to accept from the seller a shipment of potatoes, and the seller has sold them to others, in the exercise of reasonable care, skill, and prudence, the purchaser's contention that they should have been sold on his local market, and not sent to New York for the purpose, is untenable when the contract is silent on the subject and it appears that it was not intended to be sold in the local market, but to be shipped beyond that point. *Ibid.*

8. *Contracts—Brokers—Principal and Agent—Executory Contracts—Revocation—Commissioners.*—A contract for the sale of land upon commission is terminable before its consummation at the will of either party, when it is silent as to its duration. Where the owner exercises his right to revoke before the broker has procured a purchaser acceptable to him according to the terms of the agreement, the contract remains executory, and the broker, however earnest and beneficial his efforts, is not entitled to his commissions. *Olive v. Kearsley*, 195.

9. *Same—Evidence—Questions for Jury—Trials.*—Where a brokerage contract for commissions for the sale of lands is revocable by the owner at will, and the evidence is conflicting as to whether the owner, after exercising his right to revoke, had procured a purchaser from another source and had independently effected the sale, or whether the plaintiff, suing for his commissions as agent, had performed his obligations in obtaining the purchaser, an issue of fact is presented for the determination of the jury. *Ibid.*

10. *Contracts — Brokers — Principal and Agent — Commissions — Agency Coupled With an Interest.*—To prevent the application of the principle by which the principal may revoke an agency for the sale of land at will, the agency must be coupled with the agent's interest in the

CONTRACTS—*Continued.*

subject-matter of the contract, and not merely collateral thereto, as where the agent is interested only in the commissions he is to receive under the conditions of his executory contract. *Ibid.*

11. *Contracts — Breach — Fertilizer — Damages—Crops.*—Where the purchaser of fertilizer has suffered damages in the diminution of the value of his crop, caused by the vendor's breach of his contract in making delivery beyond the time specified, and at the time of the sale the vendor's sales agent knew the kind of crop the fertilizer was to be used on and the time of its planting, such damages may be recovered as are reasonable and may fairly be considered, either as arising naturally, according to the course of such matters, from the breach of the contract itself, or such as may reasonably be supposed to have been in the contemplation of the parties at the time of the sale, as the probable result of the breach of its terms; but excluding all speculative and conjectural elements which have no foundation for proof. *Fertilizer Works v. Simpson*, 251.

12. *Same—Waiver.*—Where damages to crops are recoverable by the purchaser of fertilizer for the breach by the vendor to deliver at the time specified in the contract of sale, the purchaser does not waive his right of recovery by giving his note for the purchase price when the loss was occasioned subsequently and could not then have been ascertained or estimated. *Ibid.*

13. *Contracts, Written—Subsequent Agreement — Parol Evidence — Judgments.*—The defendant contractor, under a written contract with its codefendant city, agreed to construct certain streets, and with the plaintiff, that the latter furnish crushed stone therefor in accordance with written specifications furnished: *Held*, it was competent to show that, subsequently, by parol, the defendants changed the specifications for the stones to a higher-priced quality, which the contractor agreed to pay the plaintiff; and under the facts as ascertained by the verdict, a judgment requiring the city to pay to the plaintiff the amount due to the contractor, less the amount of its counterclaim, by a credit upon the judgment against the contractor, was proper. *Lane v. Engineering Co.*, 307.

14. *Contracts, Written—Breach—Stipulated Damages—Parol Evidence.*—The written contract between the plaintiff and defendants in express terms leased to the defendants a town lot of plaintiff's under the defendants' unconditional agreement to form a hotel company in ten days, and erect thereon in a specified time a hotel at a certain cost, with the privilege of buying, etc., and that the defendants execute a note for the amount of the first year's rent, which should become the property of the plaintiff in the event the defendants failed to comply with the obligations they had assumed. The defendants did not deny execution of the contract or its breach by them: *Held*, their defense that it was contemporaneously agreed by parol, that the transaction should not be effective should the defendants fail to organize the company within the ten days agreed upon was inadmissible as varying the terms of the writing, and being liable for the first annual rent they could not take advantage of their own default in not giving the note. *Building Co. v. Sanders*, 413.

CONTRACTS—*Continued.*

15. *Same—Evidence—Admissions—Instructions—Verdict Directing.*—Where the plaintiff's evidence is sufficient to sustain his allegation for damages for breach by the defendants of their contract, and the defendants have not interposed or offered sufficient evidence of a valid defense, a verdict in the plaintiff's favor should be directed by the court. *Ibid.*

16. *Contracts—Breach—Damages—Speculative Damages—Vendor and Purchaser.*—A party breaching his contract may be liable in damages to the other party not only for loss sustained, but for gains prevented, when not purely speculative or conjectural or measured by an indefinite or fanciful conception as to what they would have been had the breach not occurred, but are the necessary and proximate result of the breach, and can be shown with reasonable certainty. The English rule of *Hadley v. Baxendale*, 9 Exch., 341; 156 Eng. Rep., 155, given, approved, and applied. *Builders v. Gadd*, 447.

17. *Same—Evidence—Nonsuit—New Trial.*—In an action to recover a balance of the purchase price of certain implements used in excavations, there was evidence, in support of defendant's counterclaim, that the plaintiff had failed to send with these implements certain parts essential for their working capacity; that the plaintiff knew their proposed use by the defendant and the time when and circumstances under which they were to be used, and in consequence of the missing parts it was necessary for, and the defendant was compelled to use extra horses and drivers, which caused the defendant to be put to an expense in a certain amount he would not otherwise have incurred: *Held*, sufficient upon plaintiff's motion as of nonsuit to take the case to the jury, and the granting of this motion was reversible error entitling the defendant to a new trial upon his counterclaim. *Ibid.*

18. *Same—Negligence—Waiver—Questions for Jury.*—Where there is evidence that the plaintiff has breached his contract in failing to deliver essential parts to excavating implements to the purchaser's loss, and there is evidence that the defendant knowingly accepted the imperfect implements at plaintiff's urgent request and promise to furnish the missing parts in time, and when others could not have been bought on the market: *Held*, the questions as to whether the defendant was negligent in his efforts to minimize his loss; or whether his acceptance of the implements after the alleged breach of contract amounted to a waiver, were for the jury, and not those of law which arise upon undisputed facts. *Ibid.*

19. *Contracts—Breach—Uncertainty—Intent—Interpretation.*—The courts look with disfavor upon the destruction of contracts on account of uncertainty, and, when possible, will so construe them as to carry into effect the reasonable intent of the parties. *Fisher v. Lumber Co.*, 486.

20. *Same—Employment for Life—Living Wages—Evidence—Damages—Employer and Employee.*—A contract of employment for a living wage for life to an injured employee for himself and family, etc., founded upon a sufficient consideration, is not too uncertain for enforcement, the persons, the purpose, and the time of the contract being given, and the amount capable of reasonable ascertainment from the evidence of the capacity of the enployee to earn wages, his physical condition, the number of his family, the cost of necessaries for an

CONTRACTS—*Continued.*

ordinary livelihood, together with the mortuary tables, etc., the final amount of the damages for the breach being reduced by such as by diligent effort he would be able to earn under his physical disability. *Ibid.*

21. *Contracts—Breach—Principal and Agent—General Agent—Implied Authority—Secret Limitations of Authority—Employer and Employee—Master and Servant.*—The local manager of one of the defendant's chain of stores has implied authority to employ clerks on behalf of his principal by the year, there being nothing unusual in contracts of this character, and where his authority is secretly limited to an employment by the month, and without knowledge or notice thereof, an employee contracts for an advanced position and increase of pay for the following year, and relies thereon, the owners of these stores are liable in damages for the breach of this contract. *Strickland v. Kress*, 534.

22. *Same—Slander—Cessation of Authority.*—The rule of liability upon the principal for the slanderous words of his agent uttered with his authority implied from transactions within the course of his employment, does not extend to instances where the defamatory words were spoken after the transaction had passed in which the agent was so acting, and after such authority had necessarily determined; as where the husband of a discharged employee thereafter asked the manager of the principal for his reason therefor, which he then gave in defamation of the character of the wife, the plaintiff in the action. *Ibid.*

23. *Contracts—Written Instruments—Interpretation—Intent.*—The intent of the parties is the proper guide in the interpretation of written contracts, ordinarily ascertained from the words employed therein, when not in contravention of other legal principles controlling in its correct interpretation. *Miller v. Green*, 652.

24. *Same—Ambiguity—Parol Evidence.*—Where the intention of the parties to a written contract has been clearly expressed, it may not be contradicted by parol evidence, for therefrom the meaning of the contract must be deduced; but where a latent ambiguity as to such intent arises from the language employed not being clear and unequivocal, the preliminary negotiations and surrounding circumstances may be shown and considered in determining the intent of the parties. *Ibid.*

25. *Same—Extraneous Facts.*—In the interpretation of a written contract a latent ambiguity may arise where the language therein used is plain, but the application of the words employed is found impracticable by reason of extraneous facts which should be considered in ascertaining what the parties actually intended. *Ibid.*

26. *Same—Consignment—Principal and Agent—Questions for Jury—Trials—Instructions.*—The defendant, a dealer in lumber, had orders therefor from foreign customers, and in turn contracted with the plaintiff to supply it at a certain price per thousand feet, to be reconsigned to the defendant's customers, upon express provision that upon payment by the consignee the defendant should receive $10 for each thousand feet, "terms of reconsignment 80 per cent draft with bill of

CONTRACTS—*Continued.*

lading; balance upon arrival of goods": *Held*, the language of the written contract was ambiguous as to whether the contract was one of consignment or a direct sale to the defendant, in plaintiff's action to recover the purchase price, leaving for the determination of the jury, under the evidence and proper instructions from the court, whether the defendant was the agent or vendee of the plaintiff. *Ibid.*

27. *Contracts—Damages. Hagood v. Holland*, 672.

CONTRACTS, WRITTEN. See Contracts.

CONTRADICTION. See Escrow, 2.

CONTRIBUTORY NEGLIGENCE. See Negligence, 13, 14, 16, 17, 20; Employer and Employee, 13; Automobiles, 2.

CONVICTION. See Elections, 3.

COPIES. See Actions, 7.

CORPORATIONS. See Injunction, 2, 8; Appeal and Error, 10; School Districts, 4; Beneficial Associations, 1; Actions, 7.

CORPORATION COMMISSION. See Public Service Corporations, 1.

CORRECTIONS. See Appeal and Error, 14.

CORROBORATION. See Criminal Law, 15, 16; Evidence, 26, 30.

COSTS. See Limitation of Actions, 6; Trespass, 1.

COUNCILS. See Beneficial Associations, 1.

COUNSEL. See Appeal and Error, 51; Trials, 4.

COUNTERCLAIM. See Deeds and Conveyances, 7; Appeal and Error, 28.

COURTS. See Appeal and Error, 32.

CRIMINAL LAW, 19; Intoxicating Liquors, 18.

COUNTIES. See Constitutional Law, 12, 13; Easements, 3; Removal of Causes, 5.

COUNTY COMMISSIONERS. See Constitutional Law, 10.

COUNTY BOARD. See Elections, 1.

COSTS.

1. *Costs—Equity—Cloud on Title—Statutes.*—Where the defendant disclaims title to lands in a suit to remove a cloud thereon, the plaintiff is chargeable with the costs under the express provisions of our statute, C. S., 1743. *Clemmons v. Jackson*, 382.

2. *Costs—Equity—Statutes—Appeal and Error.*—The *locus in quo* was formerly owned by the father of the plaintiff and defendant, the former claiming an undivided half thereof under their parent's deed conveying the lands to each of the parties upon consideration of support, which the plaintiff alleges he has performed, and that the de-

COSTS—*Continued.*

fendant has not, the latter claiming the entire tract from his parents under a prior deed. Upon a trial without error the jury found that each was entitled to an undivided half in the land, and the appeal being from taxing the defendant with costs, there being no element of an action in ejectment, *it is held*, error, neither party being permitted to recover costs from the other, C. S., 1243, especially, as in this case, the question being of an equitable nature, the taxing of costs is in the sound discretion of the court; and they are taxed equally against both parties. *Hare v. Hare*, 419.

COURTS. See Appeal and Error, 1, 6, 19, 21, 30, 44, 47; Criminal Law, 12, 24; Eminent Domain, 3, 11, 16; Jury, 1, 2, 3; Constitutional Law, 5, 18, 19; New Trials, 1; Drainage Districts, 3; Equity, 1; Evidence, 8; Instructions, 15; Husband and Wife, 1, 2; Railroads, 5; Removal of Causes, 1, 2, 3, 5; Habeas Corpus, 1, 3; Trials, 1, 2, 3; Contempt, 1; Guardian and Ward, 1; Injunction, 14; Judgments, 5, 8, 13, 15; Partition, 2, 3; Payment, 1; School Districts, 14; Intoxicating Liquors, 8, 9.

1. *Courts—Judicial Notice—Railroads—Leases.*—The question of primary and secondary liability for assessments for street paving and improvements between the defendants in this action being presented, depending upon an interpretation of a lease given by the State of its railroad property to the defendant's predecessor lessee, which has been several times before this Court in former litigation, the Court supplies the date and duration of this lease, which is important in the decision of the question, and which has been omitted from the record, it being for 91 years and 4 months from 1 September, 1904. *Kinston v. R. R.*, 15.

2. *Courts—Justices of the Peace—Jurisdiction—Landlord and Tenant—Tort—Hiring Tenant.*—As to whether, under the common law, one who has "willfully and unlawfully persuaded, induced, and assisted" the tenant of another to abandon his crops without paying his landlord for advances made to him thereon, is guilty of an actionable tort, *Quere;* but where the action has been commenced in the court of a justice of the peace it should be dismissed, if to recover more than the jurisdictional amount of $50. *Minton v. Early*, 200.

3. *Courts—Jurisdiction—Motions—Actions—Dismissal.*—A motion to dismiss an action for want of jurisdiction is not waived by answer over, but may be presented by motion to dismiss, demurrer *ore tenus*, or may be acted on by the court *ex mero motu*. *Ibid.*

4. *Courts—Conflict—Opinions—Decisions—Federal Courts—Title to Lands.*—Where the decisions of the State Supreme Court and those of the Federal Courts are conflicting in the interpretation of State statutes affecting title to real property situated within the State boundaries, the State decisions will control; and in this case *it is held*, under such conflicting authority, that our State statute requiring clerks of the Superior Court to adjudicate upon the probate to a deed for lands situated here is mandatory, and its omission will invalidate the conveyance as against the rights of purchasers and creditors. *Fibre Co. v. Cozad*, 601.

5. *Courts—Instructions—Argument of Counsel—Prejudicial Argument—Evidence—Appeal and Error—Error Effaced.*—Where the solicitor has gone beyond the evidence in his speech to the jury, to the preju-

COURTS—*Continued.*

dice of the defendant in a criminal action, and it appears that the trial judge has stopped him and required him to withdraw his statement in the presence of the jury, and instructed the jury that there was no evidence thereof, and not to consider it, the effect of the prejudicial remarks of the solicitor will be held on appeal as effaced, and a new trial will not be ordered. *S. v. Saleeby*, 740.

6. *Courts—Contempt of Court—Justices of the Peace—Habeas Corpus—Statutes.*—While engaged in the trial of causes before him the mayor of a town, with jurisdiction of a justice of the peace, went just without the door of his office for a moment or two, and while there was insulted and vilely abused and threatened with attempted assault by the petitioner in *habeas corpus* proceedings for having had a warrant issued for the petitioner's son under a criminal charge: *Held*, such acts and conduct of the petitioner constitute a direct contempt, authorizing punishment by imprisonment not to exceed thirty days or a fine not to exceed $250, or both, in the discretion of the court. C. S., 981. *S. v. Hooker*, 762.

7. *Same—Constitutional Law—Inherent Powers.*—The constitutional restriction imposed by the Constitution on the jurisdiction of justices of the peace to fines of $50 and imprisonment for thirty days, Article IV, sec. 27, apply only to the administration of the law in the trial of criminal cases, and were not intended to affect the inherent or statutory powers possessed by these courts and conferred upon them as necessary to enable them to transact business and maintain a proper respect for their authority, and in this interpretation weight is given to a like interpretation of our statute giving such courts power to punish by imprisonment not exceeding thirty days or a fine not exceeding $250, or both, in the discretion of the court, it being the same given to the judges of the superior courts, and other courts of record, for like offenses. C. S., 981, 983. *Ibid.*

8. *Courts — Evidence — Expression of Opinion — Common Law—Right—Strict Construction.*—Our statute (C. S., 564), forbidding the expression of an opinion by the trial judge upon the evidence, is in derogation of the common-law rule and its meaning will not be extended beyond its terms. *S. v. Pugh*, 800.

9. *Same—Criminal Law—Conduct of Jury—Discharge of Jury—Instructions—Remarks.*—Where the trial judge has stated to a jury after rendering a verdict in a criminal action, that from their verdict their attention was evidently attracted by important business matters at home, and therefore he would excuse them for the term, was a matter within his discretion and cannot be construed to the prejudice of a defendant in a later trial, though one of the same jurors sat upon his case, or as an expression of opinion forbidden by C. S., 564. *Ibid.*

COURT SURVEYOR. See Boundaries, 4, 7.

COVENANTS. See Deeds and Conveyances, 10; Landlord and Tenant, 5, 8, 9; Appeal and Error, 26.

1. *Covenants—Deeds and Conveyances—Seizin—Warranty of Title—Breach of Covenant—Paramount Title.*—A covenant of seizin in a conveyance of lands is that the particular state of things, the subject thereof, exists *in praesenti*, and if untrue at the time of the delivery of the

COVENANTS—*Continued.*

deed, it is an instant breach of the covenant, which differs from a covenant of warranty, for the latter is an assurance by the grantor of an estate that the grantee and his heirs and assigns shall enjoy without interruption by virtue of a paramount title, or that by force of a paramount title they shall not be evicted from the land or deprived of its possession; and being prospective, it is broken only by eviction, actual or constructive, under a paramount title existing at the time the conveyance was made. *Cover v. McAden*, 641.

2. *Covenants—Deeds and Conveyances—Warranty—Title—Breach of Warranty—Damages.*—The modern law differs from the ancient common law of England whereunder the lord, upon breach of his warranty, was required to give his vassal another *fief* of equal value, etc., and by modern interpretation the warranty of title is treated as an agreement of the warrantor to make good by compensation in money any loss directly caused by failure of the title which his deed purports to convey. *Ibid.*

3. *Same—Notice to Covenantor—Judgments—Prima Facie Case—Paramount Title—Evidence—Proof.*—Where the covenantee of title to lands has been evicted therefrom by the owner of a paramount title, and his covenantor has not been notified to come in and defend, and has not been made a party to the action, the covenantee in his action on the warranty of title, does not make out a *prima facie* case by showing judgment and eviction, for he is required to show, in addition, that he had been evicted under a paramount title. *Ibid.*

4. *Same—Eviction—Ouster.*—The covenantee in a deed for lands was evicted therefrom in an action by the owner of a paramount title, and his grantor, having made good his warranty by compensation, sued the covenantor in his deed to recover upon the breach of warranty therein. It was found as a fact that the defendant in the present action had been given due notice of the former action, with opportunity to defend the title, and upon the record and the facts found *it is held*, he was bound by the judgment in that action, establishing the paramount title in another at the time of the delivery of his deed to the present plaintiff. *Ibid.*

5. *Same—Government.*—While ordinarily there must be an eviction, actual or constructive, though not necessarily under legal process, for the covenantee to bring his action upon his grantor's breach of warranty of title, it is not essential to a constructive conviction that the paramount title be formally asserted when such title is in the State or United States Government at the time of the delivery of the deed containing the warranty. *Ibid.*

6. *Same—Possession—Trespass—Limitation of Actions.*—Where, at the time of the conveyance of lands with warranty of title, the paramount title is in the United States Government, the paramount title of the United States was such hostile assertion as amounted to a constructive eviction; and the statute of limitations began to run at the time of the delivery of the deed, C. S., 437 (2); and where neither the Government nor the parties have been in actual possession, it is not required that the covenantee or grantee in the deed enter upon the lands as a wrong-doer, and become liable to summary ejection in order to recover upon the warranty. *Ibid.*

CREDITORS. See Dower, 1; Deeds and Conveyances, 16; Receivers, 1.

CRIMINAL LAW. See Courts, 9; Seduction, 1; Municipal Corporations, 3; Intoxicating Liquors, 6, 15; Appeal and Error, 40, 58, 59; Arrest, 1, 2; Automobiles, 5; Evidence, 26, 27, 28, 30; Homicide, 6, 17, 19; Instructions, 14, 16; Judgments, 6, 8.

1. *Criminal Law—Landlord and Tenant—Abandonment of Crop—Hiring Tenant—Fraud—Statutes—Constitutional Law.*—Under the provisions of our Constitution, Art. I, sec. 16, inhibiting "imprisonment for debt excepting in cases of fraud," C. S., 4480, making it a misdemeanor for a tenant to willfully abandon his crop without paying for advances made to him by his landlord, and not requiring allegation or evidence of fraud, is unconstitutional, and the further provisions of the statute creating a civil liability for the one hiring such tenant with knowledge of the circumstances, being connected with and dependent upon the former, both in express terms and substance, is likewise unconstitutional. *Semble*, were the statute valid, an action against the person hiring the tenant, resting upon contract, would be jurisdictional in the court of the justice of the peace to the extent of $200. *Minton v. Early*, 199.

2. *Same—Contracts.*—The liability of one hiring a tenant of another who has willfully abandoned a crop without paying the landlord for advances he has made thereon fixed by the provisions of C. S., 4480, without allegation or evidence of fraud on the part of such tenant, is in contravention of the liberties and vested rights protected by constitutional guaranties that should always be upheld by the courts. *Ibid.*

3. *Criminal Actions—Contracts—Illegal Consideration—Stifle Prosecution—Bills and Notes.*—All contracts made with the prosecutor in a criminal action founded upon agreements to compound felonies or stifle prosecutions of any kind are contrary to public policy or the laws of the State, and are unenforceable whether obtained by duress or otherwise. *Aycock v. Gill*, 271.

4. *Same—Compounding a Felony—Less Offense.*—While the compounding or condoning of offenses less than a felony is not indictable, a consideration given for services to be rendered which tend to obstruct the course of justice is contrary to the administration of the law, which the courts will regard as illegal, and will not enforce. *Ibid.*

5. *Same—False Pretense.*—Where the prosecutor, in a criminal action for a false pretense, has agreed with the uncle of the defendant that upon the consideration of a note given by the uncle and the defendant for the amount of the loss, the prosecutor would state to the court that his matter with the defendant had been settled, and that he would request the court to be as lenient as possible with the defendant: *Held*, the consideration for the note was illegal, having the tendency to diminish the interest of the prosecutor, or totally withdraw it from the further prosecution of the defendant, contrary to the prosecutor's duty in the vindication of public justice. *Ibid.*

6. *Criminal Law—Attempt—Statutes.*—An attempt to commit a crime is an indictable offense, and on proper evidence, a conviction may be sustained on a bill of indictment making a specific and sufficient charge thereof, or one which charges a complete offense. C. S., 4640. *S. v. Addor*, 687.

CRIMINAL LAW—*Continued.*

7. *Same—Preparation—Intent—Overt Acts.*—The intent, though connected with preparations to commit a criminal offense, is not alone sufficient for a conviction of the attempt, unless connected with some overt act or acts towards the end in view that will, in the judgment of the one charged, and as matters appeared to him, result in the consummation of the contemplated purpose. C. S., 4640. *Ibid.*

8. *Same—Spirituous Liquor—Intoxicating Liquor—Verdict—Judgment.*—Upon the trial for an attempt to violate our statute in the manufacture of intoxicating liquor, it was established by a special verdict that the defendants placed a bag of meal and nailed a coffee mill to a tree at the place of intended operation, with intent to manufacture the liquor, but that they had no still, but had a promise of one later: *Held,* insufficient to sustain a judgment of guilty of an attempt to commit the offense charged. C. S., 4640. *Ibid.*

9. *Criminal Law—Intoxicating Liquor—Spirituous Liquor—Misdemeanor—Grand Jury—True Bill—Courts—Jurisdiction.*—Where a recorder's court is given jurisdiction in trials for the possession and unlawful sale of intoxicating liquor, with authority to transfer the same to the Superior Court upon defendant's desiring a jury trial, it is unnecessary, when such is done, that a true bill will be found in the latter court, the lower court having jurisdiction of the misdemeanor. *S. v. Saleeby,* 740.

10. *Criminal Law—Intoxicating Liquor—Spirituous Liquor—Indictment—Evidence—Trials.*—Exception that there was no evidence that the defendant unlawfully sold intoxicating liquor to the person named in the indictment, is untenable, when after the defendant has introduced evidence at the trial, the State has, in rebuttal, introduced evidence that the defendant had sold such liquor to the person, as charged in the indictment. *Ibid.*

11. *Same—Surplusage.*—It is not necessary, for conviction, that an indictment for the possession and unlawful sale of intoxicating liquor charge the sale was made to a specified person, and where the indictment does so charge, it is surplusage. *Ibid.*

12. *Criminal Law—General Verdict—Appeal and Error—New Trial.*—Upon a general verdict on two counts of an indictment, error as to one of them alone will not entitle the defendant to a new trial on appeal. *Ibid.*

13. *Criminal Law—Larceny—Evidence—Appeal and Error—Irrelevant Evidence—Prejudicial Error.*—The circumstantial evidence on the trial in this case for larceny of tobacco, tending to show that the prosecutor's tobacco had been stolen and brought to market by the defendant and sold on the warehouse floor; that he was without money on the day preceding the sale, and had it the day following, *is held* sufficient to sustain a verdict of conviction, but a new trial is awarded on appeal upon the unexplained introduction of a canceled check made payable to another named person, or bearer, without evidence that it had ever been in defendant's possession or connecting him with it; as such, though technically irrelevant, must have prejudiced the defendant to the jury when taken with other evidence relating to his lack of money the day before, and his having it the day after the tobacco sale. *S. v. Freeman,* 743.

CRIMINAL LAW—*Continued.*

14. *Criminal Law—Rape—Evidence.*—Where the 8-year old sister of the prosecuting witness in an action for rape has testified that she witnessed the act, it is competent for her to testify that she was then "too scared" to call out and alarm the neighborhood, as an explanation of her failure to give the alarm, its weight to be determined by the jury. *S. v. Montgomery*, 747.

15. *Same -Involuntary Exclamations - Physical Suffering — Corroborative Evidence.*—Where the prosecuting witness has testified, in an action for rape, as to her physical suffering afterwards, as the result of the defendant's act, it is not error to admit the testimony of the mother that the prosecutrix soon afterwards complained of physical and nervous suffering, when the trial judge confined this evidence to the purpose of corroboration in his instructions; further, such involuntary expressions, under the circumstances, are admissible as substantive evidence. *Ibid.*

16. *Criminal Law—Rape — Evidence — Corroboration—Instructions—"persuade"—Words and Phrases.*—Where the defendant, tried for rape, has taken the stand in his own behalf, and introduced witnesses to corroborate his statements by what he has told them after the act charged, and the judge, in his charge, has limited this testimony for the purpose of corroboration, it is not error for him to say that, the evidence being admitted for that purpose, it was for the jury to say how far it would "persuade" them to believe the defendant's testimony on the subject, the word "persuade" being also defined as "cause them to believe." *Ibid.*

17. *Criminal Law—Rape — Instructions — Appeal and Error — Harmless Error.*—Where in an action for rape the trial judge has charged the jury that the witness, having taken the stand, may prove his good character as substantive evidence to be considered by them as tending, along with the other evidence, to show his innocence, his further charge that the defendant's good character "would cut no figure" if the jury found upon the evidence, after considering his good character and giving him the full benefit of it, that he was guilty beyond a reasonable doubt, is not reversible error, when it appears from the charge, considered as a whole, that the defendant received the full benefit of all evidence of this kind. *Ibid.*

18. *Criminal Law—Judgments—Condition of Good Behavior—Rearrest.*—Where the trial judge ascertains that the defendant in a criminal action has violated the condition of good behavior, upon which judgment had been rendered against him at a prior term of court, and orders him into custody under the judgment previously rendered, it is not objectionable as pronouncing judgment in that case, but is in conformity with our decisions. *S. v. Strange*, 775.

19. *Criminal Law—Indictment—Counts—General Verdict—Evidence—Presumptions.*—Where there is evidence to sustain a conviction on one or several counts of an indictment, a general verdict will be presumed to have been returned on the count or counts to which the evidence applies. *Ibid.*

20. *Criminal Law—Larceny—Stolen Goods—Recent Possession—Presumptions.*—For the recent possession of stolen goods to raise the presumption of law that the defendant, upon whom they were found,

CRIMINAL LAW—*Continued.*

was the thief, such possession must be so soon after the fact of the theft shown that the defendant could not reasonably have gotten possession of them unless he had stolen them himself, or where the fact of his guilt is self evident from the bare fact of being found in possession of them. *S. v. Lippard*, 786.

21. *Same—Instructions—Burden of Proof—Appeal and Error.*—Where the fact of possession of stolen goods is insufficient to raise a presumption of law that defendant upon whom they were found was himself the thief, and he has offered evidence tending to establish his innocence, an instruction that he is presumed, as a matter of law, to be the thief, is reversible error, in placing upon him a greater burden of proof than required of him. *Ibid.*

22. *Same—Automobiles.*—In an action to convict the defendant of the larceny of an automobile, there was evidence on behalf of the State tending to show that two weeks or more after the theft certain parts or accessories of the stolen machine were in the defendant's possession, but that the machine itself was never found, with confusing and contradictory statements of the defendant as to his lawful possession, as well as other evidence of his innocence, an instruction to the jury: *Held* reversible error; that one found in possession of stolen property is presumably the thief, without the necessity of the State to introduce further proof, and that the burden is on the defendant to show his lawful possession of them. *Ibid.*

23. *Criminal Law—Homicide—Resisting Arrest—Evidence—Dying Declarations—Res Gestæ.*—Where there is evidence that a deputy sheriff was killed while arresting the prisoner in seeking to identify him as the one for whom he had a warrant of arrest, the dying declaration of the officer that he had been killed while trying to do his duty, is competent as a part of the *res gestæ*. *S. v. Hall*, 807.

24. *Same—Court's Discretion—Reopening Case.*—After the State has rested its case on a trial for a homicide, it is within the discretion of the trial judge to reopen the case and permit the defendant to offer evidence of the dying declarations of the deceased, and his refusal is not reviewable on appeal. *Ibid.*

CROPS. See Criminal Law, 1; Contracts, 11.

CROSS-EXAMINATION. See Evidence, 17, 27.

CURATIVE ACTS. See Constitutional Law, 9.

CUSTOM. See Contracts, 2; Negligence, 10.

DAMAGES. See Appeal and Error, 2, 15, 16; Municipal Corporations, 1; Seduction, 1; Trusts, 5; Carriers, 5, 7, 13, 16; Contracts, 5, 6, 11, 27; Deeds and Conveyances, 4, 7; Evidence, 12, 17; Contracts, 4, 16, 20; Landlord and Tenant, 7, 8, 9; Instructions, 5; Libel, 1, 2; Negligence, 19; Trespass, 1, 3; Covenants, 2.

1. *Damages — Fires — Rules of Insurance Companies — Negligence.*—The rules of insurance companies relative to placing insurance upon a certain class of dwellings is not competent on the inquiry as to the

DAMAGES—*Continued.*

value of a dwelling of that class destroyed by fire, which is the subject of the plaintiff's action to recover damages of the defendant for its negligence in causing the loss. *Peterson v. Power Co.*, 243.

2. *Damages—Personal Injuries Proximate Cause—Measure of Damages.*—For a personal injury proximately caused by the negligence of another, damages past, present, and prospective are recoverable in one sum, fixed by the jury as being, in their judgment, upon the evidence, a fair and reasonable compensation to the plaintiff, in which they may indemnify the plaintiff for actual nursing, medical attention, etc., and consider his age, prospects, wages, salary, or income from his profession, his mental and physical sufferings, upon evidence tending to show that the injury proximately caused them, the sum so awarded to be on the basis of a present cash settlement. *Ledford v. Lumber Co.*, 614.

DANGEROUS INSTRUMENTALITIES. Employer and Employee. 1.

DAYS OF GRACE. See Insurance, Life, 1.

DEADLY WEAPONS. See Homicide, 6, 7, 11.

DEBT. See Marriage, 1; School Districts, 10; Payment. 3; Pleadings, 5.

DEBTOR AND CREDITOR. See Marriage, 1.

DECEASED PERSONS. See Evidence, 2.

DECEIT. See Injunction, 6.

DECLARATIONS. See Evidence, 4, 16.

DEDICATION. See Limitation of Actions, 1.

DEEDS AND CONVEYANCES. See Public Officers, 1; Receivers, 1; Injunction, 5; Instructions, 1; Mortgages, 5; Parent and Child, 3; Wills, 5, 10; Estates, 3, 4; Game, 2, 5, 7, 8; Boundaries, 1, 6; Parties, 1; Appeal and Error, 26; Covenants, 1, 2.

1. *Deeds and Conveyances — Interpretation — Intent—Technical Rules.*—That the intention of the parties particularly of the grantor, must control is the cardinal rule in the construction of deeds. *Lumber Co. v. Herrington*, 85.

2. *Same—Remainder—Children in Esse.*—A remainder to a class of children, or more remote relatives, vests in right, but not in amount, in such of the objects of the bounty as are *in esse* and answer the description, subject to open and let in any that may afterwards be born before the determination of the particular estate; and a sale may generally be authorized by the court where, in case of a remainder to a class, those of the class who are *in esse* represent the others. In such case it is assumed that those who represent a particular class will protect the interest of all who have or may acquire an interest in the remainder. *Ibid.*

3. *Deeds and Conveyances—Consideration—Parol Evidence—Statute of Frauds.*—Parol evidence to show the actual consideration in a deed to lands, executed and delivered, different from that therein expressed is neither at variance with the rule against changing or adding

DEEDS AND CONVEYANCES—*Continued.*

to the terms of a written instrument, nor within the prohibition of the statute of frauds, but is of an independent contract outside of the covenants appearing in the deed, and the vendor may prove by parol the amount thereof, the terms of payment and its nonpayment. *Pate v. Gaitley*, 262.

4. *Same—Rental—Actions—Damages.*—During the continuance of the lease of a large tract of land for the agreed annual payment of fifteen bales of cotton as rent, the lessee obtained an option of purchase at the price of $15,000, which he exercised in September of that year, receiving from the lessor and the owner a warranty deed of the *locus in quo* with full covenants: *Held*, parol evidence was competent to show that the agreed rental was reserved from the purchase price of the land, expressed in the deed, in the vendor's action to recover the rent cotton or its value. *Ibid.*

5. *Deeds and Conveyances—Intent—Formal Parts.*—The intention of the parties is now regarded as the chief essential in the construction of conveyances, the object sought being for substance, not form, giving effect to every part of the deed, no clause being construed as meaningless if reasonable intendment can be found therefor, and the intention thus ascertained will prevail over the old rule dividing the deed into its formal parts and disregarding contradictions in the *habendum* of the quality or quantity of the estate granted in the premises. *Willis v. Trust Co.*, 267.

6. *Deeds and Conveyances—Timber—Reservations—Purchasers of Land—Contracts—Breach—Evidence—Nonsuit.*—The owner of lands conveyed the timber growing thereon to the defendant with right to cut and remove the same within a term of years, but with further provision that a purchaser of the land from him, upon six months written notice, would have the right to clear such acreage as he should designate, leaving the remainder for the defendant under the provisions of his timber deed. In the purchaser's action for damages, wherein an injunction has been issued, evidence, without more, tending to show that the plaintiff had bought the land on speculation, without intention to clear it, and that his purchaser had refused the land because of the dispute, is insufficient to sustain the plaintiff's action, and a motion as of nonsuit thereon was properly granted. *Gatewood v. Fry*, 415.

7. *Deeds and Conveyances—Timber—Contracts—Breach—Limitation of Actions—Statutes—Pleadings—Counterclaim—Damages.*—Where it appears that a purchaser of timber standing upon the land would have cut and removed the same within the time specified for that purpose, except for an injunction erroneously issued in the suit of the plaintiff: *Held*, C. S., 413, does not have the effect of extending the period of time for cutting and removing the timber fixed by the terms of the contract, and the defendant's damages, arising or growing out of the same transaction, may be pleaded as a counterclaim, and it is permissible to ascertain and award the same, to the time of the trial, it being the full net value of the timber, of which he has been deprived. *Ibid.*

8. *Deeds and Conveyances—Husband and Wife—Probate—Officers—Statutes—Certificates—Amendments—Subsequent Certificate—Justices of

DEEDS AND CONVEYANCES—*Continued.*

the Peace—Notary Public.—Where a justice of the peace has failed to certify his finding that the deed of the wife's lands to her husband and herself to be held by them in entirety was not "unreasonable or injurious to her," as required, among other things, by C. S., 2515, he may not, after the death of the wife, validate the deed by making a new certificate including this vital finding as of the time of his first probate, or excuse himself upon the ground of ignorance or inadvertence, it being at least required that she should have had due notice of this proposed action, and have been afforded an opportunity to be heard; and the deed itself being void under the statute, the will of the husband disposing of the *locus in quo* is also ineffectual. *Semble*, after executing the first certificate, the power of the justice ceased or became *functus officio;* but this point is not herein decided. *Smith v. Beaver*, 497.

9. *Deeds and Conveyances—Trusts—Parol Trusts—Contracts—Evidence.*—Where, in adjustment of their dealings, a mortgagor has conveyed to the mortgagee by absolute deed a part of the mortgaged premises, and the rights and equities growing out of the relationship has been concluded by judgment of a court having jurisdiction, the mortgagor may not set up a parol trust in his favor in contravention of his own written deed. *Gaylord v. Gaylord*, 150 N. C., 222, cited and applied. *Swain v. Goodman*, 531.

10. *Deeds and Conveyances—Title—Breach of Covenants—Title Perfected—Nominal Damages.*—Where the covenant of seizin in a deed to lands is broken at the time the conveyance was made, and the defect is incurable, and goes to the entire estate, the amount recoverable by the covenantee in his action is the value of the land as fixed by the consideration agreed upon by the parties, to wit, the purchase money, but subject to an equitable adjustment in our courts administering principles of both law and equity, when it is properly made to appear that the covenantee has acquired title for a lesser sum, when it will be so restricted; and where the covenantor has perfected the title in himself, which, under the covenants in his former conveyance, will inure to the benefit of his grantee, the damages recoverable for the breach of the covenant of title shall be only nominal. *Meyer v. Thompson*, 543.

11. *Same — Contingent Estates — Statutes — Sales —Judgments —Confirmation of Sale.*—Where the grantors in a deed have erroneously assumed that they had title to the lands they conveyed in fee, but which was affected by future contingent interest not at present ascertainable, and thereafter bring action to make title under the provisions of C. S., 1744, which authorizes the sale of land affected by such contingencies, and in these proceedings have protected the interests of the remote remainderman by the appointment for them of a guardian *ad litem*, and have fully set forth the facts and circumstances of the former sale, and being in the proceeds and submit them to the jurisdiction and orders of the court, the final judgment properly authorizing and confirming the sale, and being had in conformity with the provisions of the statute, perfects the title and same will inure to the benefit of the covenantee in the former deed, and for a breach of this covenant only nominal damages are recoverable. *Poole v. Thompson*, *post*, 588, cited and applied. *Ibid.*

DEEDS AND CONVEYANCES—*Continued.*

12. *Deeds and Conveyances—Registration—Probate—Fiat of Clerk of the Superior Court—Statutes.*—In order to the validity of a conveyance of lands, it is a mandatory requirement of our statute, brought forward and now found in C. S., 3305, that the clerk of the court adjudicate the sufficiency of the act of the probate officer before whom the grantor's acknowledgment has been taken, and issue his *fiat* or order for registration; and while it is held that such act is directory upon the clerk of the Superior Court of the county wherein the land is situated, it is only thus where such *fiat* or order of registration has been properly made by the clerk of another county upon which such power has been conferred by the statute, and in the absence of any proper *fiat* or order for registration, the conveyance will be ineffectual against the rights of purchasers and creditors of the grantor. *Fibre Co. v. Cozad*, 600.

13. *Same—Decisions.*—The opinions of the Supreme Court should be construed in the view of the subject-matter as presented in each particular decision, and *it is held*, in reviewing the former decisions upon the question, that the statute is mandatory in requiring that the clerk of the Superior Court adjudicate upon the probate taken to a conveyance of land, and issue his *fiat* or order of registration; though it is not necessary to its validity that the clerk of the Superior Court of the county wherein the land is situated should have passed upon such *fiat* or order for registration made by the clerk of another county, clothed with authority to do so by the statute. C. S., 3305. *Ibid.*

14. *Deeds and Conveyances—Registration—Defects—Probate—Fiat—Clerks of Court—Commissioners of Deeds—Title—Mortgages—Sales.*—The probate to a mortgage of lands situated in North Carolina, taken by the commissioner of deeds in another State, registered without the *fiat* or order for registration by a clerk of the Superior Court within the State, and clothed with authority to do so by our statute, is ineffectual as against purchasers or creditors to pass title to the purchaser at the foreclosure sale, or those claiming under him. C. S., 3305. *Ibid.*

15. *Same—Remedial Statutes—Vested Rights.*—The act of 1913, now C. S., 3362, authorizing and validating registration of conveyances probated before commissioners of deeds of another state, etc., cannot have the effect of impairing vested rights of purchasers at an execution sale under judgment, or those holding the land under his deed. *Ibid.*

16. *Deeds and Conveyances—Mortgage—Registration—Defects—Purchasers—Creditors—Judicial Sales—Execution—Title—Common Source.*—The purchaser of lands under execution sale not only acquires the title the judgment debtor may have had, but also the right of the creditor; and where a common source of plaintiff's and defendant's title is shown, and a deed of foreclosure in plaintiff's chain of title is fatally defective, he therein fails to show a superior title to that of the defendant derived under the sheriff's deed to the lands sold under execution. *Ibid.*

17. *Deeds and Conveyances—General Description—Boundaries—Plantation Intent.*—Where the title to lands in dispute is dependent upon the description thereof in a deed given by the sheriff to the defendant under execution sale, wherein he described the lands as a certain

DEEDS AND CONVEYANCES—*Continued.*

plantation, which is shown to have been well known, with established boundaries, with an attempted but erroneous specific description in part as to adjoining boundaries, the intent of the grantor to convey the plantation by its established boundaries as gathered from the whole instrument will prevail over the inaccurate or attempted more definite description, which construed alone would be insufficient to convey any lands within the contemplation of the parties. *Dill v. Lumber Co.*, 660.

18. *Same Reference—Appeal and Error.*—Where the action involving title to lands depends upon the intent of a grantor in a deed as to the identity of the lands described, and by consent of the parties has been referred and upon sufficient supporting evidence, the referee has found the intent to have been to convey a certain and known plantation with definite boundaries, and such finding has been adopted by the trial judge, the fact so established will not be disturbed on appeal. *Ibid.*

19. *Same—Decisions—Opinions.*—The rule that the courts will adopt a more particular or specific description in a deed to lands, as being more certain and reliable than a more general one, has no application when it is shown that the more particular description is so manifestly erroneous, and is so in conflict with the more general one, and so indefinite and inadequate that it will not fit the description of the land clearly intended to be conveyed, and the general description is alone sufficient and definite for the purpose. *Ibid.*

20. *Same—Execution Sheriff's Deed.*—A sheriff's deed to land sold under execution of a judgment described the lands as Town Point Plantation, and gave particular boundaries that were incomplete and inaccurate: *Held,* it was competent to show that the plantation was well known in the community under definite bounds as designated, that the execution had been issued and the sale advertised and made of this particular tract of land, and these facts being established, the attempted and ineffectual part description by certain boundaries should be disregarded in ascertaining the land actually conveyed by the sheriff's deed. *Ibid.*

DEEDS IN TRUST. See Liens, 5.

DEFALCATION. See Payment, 4.

DEFAULT. See Pleadings, 5.

DEFECTS. See Deeds and Conveyances, 14, 16.

DELEGATION OF POWER. See Employer and Employee, 12.

DELIVERY. See Carrier, 3, 8, 14; Statutes, 3; Appeal and Error, 23.

DEMURRER. See Appeal and Error, 28; Judgments, 2.

DEPOSITS. See Banks and Banking, 1.

DEPUTIES. See Public Officers, 1.

DESCRIPTION. See Instructions, 1; Deeds and Conveyances, 17.

DETERMINABLE FEE. See Estates, 3, 4.

DEVISAVIT VEL NON. See Evidence, 11, 18; Executors and Administrators, 11; Wills, 7.

DEVISE. See Wills, 5, 6.

DIRECTING VERDICT. See Vendor and Purchaser, 3; Contracts, 15; Instructions, 14.

DIRECTOR GENERAL. See Judgments, 1.

DISCHARGE. See Appeal and Error, 57; Courts, 9.

DISCRETION. See Eminent Domain, 5, 16; Appeal and Error, 19, 44, 47; Equity, 1; Trials, 2; Evidence, 8; Injunction, 14; Husband and Wife, 1, 2; New Trials, 1; Habeas Corpus, 1; Criminal Law, 24; Removal of Causes, 5; Jury, 2, 3.

DISMISSAL. See Appeal and Error, 10, 12, 19, 28, 55, 56; Courts, 3; Habeas Corpus, 3.

DIVORCE. See Husband and Wife, 5.

DOCKET. See Appeal and Error, 19, 46.

DRAINAGE DISTRICTS.

1. *Drainage Districts — Assessments — Timber—Illegal Assessments.*—An assessment for benefits on timber growing upon lands in a drainage district, independent from and exclusive of the assessments made upon the lands, is illegal, it being required that the lands only be assessed in accordance with the benefits they receive. *Daugherty v. Comrs.*, 149.

2. *Same—Inequality of Assessment—Deficiency—Reassessment—Commissions.*—Where timber growing upon lands in a drainage district have been leased, an assessment of the value thereof cannot legally be deducted from the amount of the assessments that have properly been made on the lands, and the board of drainage commissioners, on proper notice, should correct such illegal deductions from the former assessment roll by reassessing these particular lands in accordance with their original classification. *Ibid.*

3. *Same—Courts—Orders Preserving Papers—Notice.*—Where it appears that the circumstances of the proceeding require it, it is proper for the trial judge, in correcting an error in assessing leased timber separate from the lands, to order the board of drainage commissoners to prepare and file without delay a statement showing the receipts and expenditures of all funds coming into their hands belonging to the district, have the court papers, maps, etc., recorded, and call a meeting of the landowners of the district. *Ibid.*

4. *Drainage Districts — Assessments — Deficiency — Motion in Cause—Actions.*—Where owners of certain lands in a drainage district are injured by a deficiency of the funds caused by an illegal deduction of assessment on the lands of other owners which the commissioners may lawfully correct, a petition in the original proceedings is proper to have the correct assessment made. *Ibid.*

DRUNKENNESS. See Homicide, 19.

DOWER.

Dower—Executors and Administrators—Lands—Sales—Assets—Creditors.—Upon the petition of the widow, as executrix and individually, to have the lands of her deceased husband sold to pay his debts, and for the allotment of her dower therein, the widow is entitled to her dower in the lands, and, subject thereto, the lands should be sold under the statute to make assets to pay the debts of the deceased, it appearing that the personal property is inadequate. *Curry v. Curry*, 83.

DURESS. See Libel, 3; Payment, 1.

DUTIES. See Employer and Employee, 2, 5, 6, 10, 12, 16, 17; Landlord and Tenant, 9.

DYING DECLARATIONS. See Criminal Law, 23; Evidence, 21; Homicide, 5, 23.

EASEMENTS. See Eminent Domain, 1; Injunctions, 13.

1. *Easements—Alleyways—Common Source—Evidence—Chain of Title—Prima Facie Case—Nonsuit—Trials.*—Where the plaintiff claims an easement in an alley along the edge of the defendant's adjoining lands, and relies upon a paper chain of title from a common source, without possession, and fails to connect himself therewith, he fails to make out a *prima facie* case, and a judgment as of nonsuit upon the evidence is properly rendered. *Semble*, in the instant case, no rights have been lost by mere nonuser or failure to open the alleyway. *Craver v. Hotel*, 317.

2. *Easements — Way of Necessity — Cartways — Statutes — Public-Local Laws.*—While, under the provisions of our general statute, C. S., 3836 *et seq.*, a petitioner who already has an outlet from his lands to a public road, reasonably sufficient for the purpose, is not allowed to have an additional or different cartway established merely because a shorter and better route can be shown, it may be otherwise when the petitioner has proceeded under the provisions of a special local law applicable to a certain county allowing it under certain conditions, the provisions of the local law controlling those of the general statute on the subject. *Farmer v. Bright*, 655.

3. *Same — Counties — Petition—Evidence—Nonsuit—Questions for Jury—Trials.*—Where, under the provisions of a public-local law, the commissioners of a county, etc., upon petition, may cause a private cartway over the lands of an adjoining owner to be established upon sufficient reason shown: *Held*, the general law, C. S., 3836, is not applicable, and upon appeal by the petitioner from the refusal of the county commissioners to order the cartway made, it is error for the Superior Court judge to dismiss the action as of nonsuit upon the evidence, which, if accepted by the jury, would entitle the petitioner to have his cartway in accordance with the terms of the local statute applicable. *Ibid.*

EJECTMENT. See Landlord and Tenant, 1; Actions, 3.

ELECTIONS. See Cities and Towns, 3; School Districts, 2, 3, 5, 12; Injunction, 10; Constitutional Law, 14, 16; Statutes, 6, 7; Appeal and Error, 31, 35.

1. *Elections—Quo Warranto—County Board of Canvassers—Prima Facie Case.*—In proceedings in the nature of a *quo warranto,* to determine the respective rights of the parties contesting for an office, the result of the election, as declared by the county board of canvassers, must be taken as *prima facie* correct. C. S., 5986. *S. v. Jackson,* 695.

2. *Elections—Votes—Felony—Constitutional Law.*—In a contested election case, a conviction of an offense under a local law prescribing punishment in the State's Prison, renders void the vote of the one so convicted, whether the indictment charged or failed to charge that the alleged offense was "feloniously" committed. Const., Art. VI, sec. 2. *Ibid.*

3. *Elections—Votes—Felonies—Conviction—Statutes—Election of Prosecution.*—Where the eligibility of a voter at a contested election depends upon either a conviction under a local prohibition act or under the general act of 1908, now C. S., 411, the former prescribing the word "feloniously" selling spirituous liquor, etc., and the other not so prescribing it, a conclusion by the referee, approved by the court, that a charge in the indictment of the word "feloniously" was an election of the State to prosecute under the private act, and the failure of the use of this word, an election to prosecute under the general statute, was not error, the general statute expressly excepting from its provisions special or local acts relating to the subject. *Ibid.*

4. *Elections—Votes—Absentee Voters—Statutes.*—Under the provisions of Public Laws of 1917, ch. 23, those who were within the county at the time of an election were not accorded the privilege of voting as absentee voters; and the votes of those who were within the county and cast by this method, before the amendment of 1919, now C. S., 5960, are invalid, and should not be counted. *Ibid.*

EMINENT DOMAIN.

1. *Eminent Domain—Turnpikes—Public Use — Condemnation—Statutes—Easements.*—The taking of private lands for turnpike or toll-road purposes is for a public use, and may be acquired for such purposes by proper proceedings before the clerk of the court of the appropriate county under the provisions of C. S., 1705 *et seq.,* when the corporation has been organized under the provisions of our general incorporation law, C. S., 1113 *et seq.,* and has express charter powers to do so. *Retreat Asso. v. Development Co.,* 43.

2. *Same—Private Purposes.*—The right of a corporation to condemn lands for a public use, having the statutory powers, is not affected or impaired because in the charter it may be given rights of a more private nature to which the right of condemnation may not attach. *Ibid.*

3. *Eminent Domain—Clerks of Court — Statutes — Procedure — Courts—Jurisdiction — Writ of Prohibition — Actions—Injunction—Equity.*—Where it is properly made to appear from the petition in proceedings to condemn lands of private owners for the purpose of a turnpike road, brought before the clerk of the court of the proper county, that the petitioner is a duly incorporated company, having the right of

EMINENT DOMAIN—*Continued.*

eminent domain, and the proceedings are in conformity with the statute as to the termini, route of the proposed road, etc., an attempt by such owners to obtain an injunction by independent action is, in effect, an erroneous effort to obtain a writ of prohibition restraining the clerk of the court from exercising the jurisdiction conferred exclusively on him by statute, cognizable only in the Supreme Court, it being required that the want of authority of the petitioner to condemn the land be taken by answer in the proceedings before the clerk, C. S., 1720; and the action will be dismissed. *Ibid.*

4. *Eminent Domain—Government—Private Property—Public Use—Compensation—Constitutional Law.*—A government has, under the power and principles of eminent domain, the right to appropriate private property for a public use, on making due compensation therefor. *Jennings v. Highway Com.*, 68.

5. *Same—State Agencies—Discretion—Statutes.*—Where the statute authorizes the taking of private property for a public purpose, the necessity for the exercise of the power in a given case, and the extent of it, under all ordinary circumstances, is for the Legislature, either directly or through subordinate agencies designated for the purpose. *Ibid.*

6. *Same — Reasonableness and Necessity — Implied Powers.*—When the Legislature has not defined the extent or limit of the appropriation of private property to be taken for a public use, the authorities charged with the duty are restricted to such property in kind and quantity as may be reasonable and necessary to the purpose designated. *Ibid.*

7. *Same—Questions of Law—Trials.*—Where the statute does not definitely determine as to the kind and quantity of private property to be taken by its designated agencies for a public purpose, such kind and quantity may be so taken by them as may be reasonably necessary therefor; but when such agencies have acted in good faith and do not exceed a reasonable discretion with which it is vested, the courts will seldom, if ever, interfere. *Ibid.*

8. *Same—Notice to Owner—Time of Payment.*—Where the statute authorizing designated agencies of the State to take private property for a public use otherwise provides, it is not necessary to notify the owner that his property is to be appropriated: *Provided*, he is to be notified and given opportunity to be heard in the proceedings on the question of compensation that may be due him. *Ibid.*

9. *Same—State Highway Commission—Roads and Highways.*—Under the provisions of our statutes the State Highway Commission is given power to enter on and appropriate land of private owners, on giving notice, for the purpose of constructing highways as a part of the State system, C. S., 3667 *et seq.*, with the right to acquire material, gravel beds, etc., necessary for the construction and maintenance of such roads, conferring for the purpose the powers of eminent domain (C. S., 1715 *et seq.*), with an additional provision in enlargement of such powers, authorizing the commission to enter the lands, take possession of such timber and materials, and use them for the purpose required, prior to bringing condemnation proceedings, and without making a deposit, etc., in the event of the owner's appeal, or compensating the owner prior to the final determination of the action as

EMINENT DOMAIN—*Continued.*

to the amount: *Held*, the right of the commission to use the materials for the purposes stated being specifically given by statute, it is not required that the board first proceed by action before taking the necessary materials for the State highway construction or maintenance. *Ibid.*

10. *Eminent Domain—Condemnation—Statutes—Exceptions—Dwellings—Municipal Corporations—Cities and Towns.*—Where a city, under its charter, is given the same power to condemn lands of private owners for municipal purposes that is given to railroads and other public utilities, it is bound by the restrictions placed on them by C. S., 1717, which provides that such power shall not extend, among other things, to dwellings, without the consent of the owner; and the principle arising under the general power to condemn, leaving the matter largely within the discretion of the governing authorities seeking condemnation, does not apply to the statutory exceptions. *Selma v. Noble,* 322.

11. *Eminent Domain—Condemnation—Clerks of Court—Procedure—Appeal—Jurisdiction—Courts.*—Where issuable matters are raised before the clerk in proceedings to condemn the lands of private owners for a public use, the clerk should pass upon these matters presented in the record, have the land assessed through commissioners, as the statute directs, allowing the parties, by exceptions, to raise any question of law or fact issuable or otherwise to be considered on appeal to the Superior Court from his award of damages, as provided by law. *Ibid.*

12. *Same—Injunction.*—Under the method of procedure in the condemnation of lands for a public use: *Held*, that issuable matters raised by the parties should be taken advantage of by exceptions, and the entire record sent up to the Superior Court by the clerk, where all exceptions may be presented, the rights of the parties may be protected meantime from interference by injunction issued by the judge on application made in the cause, and in instances properly calling for such course. *Ibid.*

13. *Eminent Domain—Condemnation—Municipal Corporations—Cities and Towns—Streets—Offer to Dedicate—Acceptance.*—Where a municipal corporation has not accepted the offer of a private owner of lands to dedicate the streets and an open square of his lands he has had platted for sale, the proceedings of the municipal corporation to condemn a part of these lands for a public use presents entirely a question of private ownership, and of itself sets up no issue in bar of condemnation proceedings before the clerk, pursuant to the statutory authority and according to the course and practice of the court. *Ibid.*

14. *Same—Acquired Jurisdiction.*—Where the clerk of the Superior Court has erroneously at once transferred the proceedings in condemnation to the Superior Court on issue joined between the parties, and an appeal therefrom has been taken to the Superior Court, the judge thereof acquires jurisdiction for the hearing and determination of the controversy under the provisions of C. S., 637, and may order other proper or necessary parties to be made for the further determination of the cause. *Ibid.*

15. *Eminent Domain—Condemnation—Nuisance—Dwellings—Statutes—Exceptions.*—The creation and maintenance of a nuisance which sensibly impairs the value of lands of private owners is a taking within the

EMINENT DOMAIN—*Continued.*

principle of eminent domain and condemnation proceedings thereunder, and within the exception contained in C. S., 1714, withdrawing dwellings from the effect of the statute. *Ibid.*

16. *Same—Appeal — Superior Courts — Courts—Jurisdiction—Discretion of Court—Parties—Trials.*—The owner of land divided it into building lots, upon condition of the advantages of a square to be kept open for their use, and some of these lots had been purchased and built thereon for homes. The town, not having the statutory authority to condemn dwellings, instituted proceedings to condemn this open square for an addition to the city cemetery, and upon issue joined in Superior Court as to whether a cemetery so situated would be a nuisance and injure the homes upon the lots sold, the clerk, under exception, erroneously transferred the proceedings for trial at term: *Held,* it was in the discretion of the Superior Court judge to make the purchasers of the homes parties and hold the case for the determination of the jury before proceeding further. *Ibid.*

EMPLOYER AND EMPLOYEE. See Railroads, 4, 7; Negligence, 4, 10, 15; Carriers, 17; Compromise and Settlement, 2; Contracts, 20, 21; Fires, 1; Limitation of Actions, 4.

1. *Employer and Employee—Master and Servant—Rules—Dangerous Instrumentalities.*—There was sufficient evidence in this case to show that a rule of defendant company required its employees operating a smaller of one of two engines at its plant to give warning to the plaintiff while at work in a dangerous position, under circumstances frequently recurring, and not dangerous when the machinery was idle, that they were about to start the engine. *Cook v. Mfg. Co.,* 48.

2. *Same—Nondelegable Duties—Fellow-servants—Safe Place to Work.*—*Held,* there was evidence in this case that the omission of the defendant's employees to warn the plaintiff that they were about to start the engine to operate the machinery was the proximate cause of the injury in suit, and that to give such warning was a nondelegable duty of the defendant, rendering untenable the defense that the negligence was that of the plaintiff's fellow-servants alone, and not attributable to the master under the facts and circumstances of this case. *Ibid.*

3. *Employer and Employee—Master and Servant—Negligence—Safe Appliances—Evidence.*—Where the principle requiring an employer to furnish his employee reasonably safe tools and machinery with which to perform his services is involved in the issue as to defendant's negligence in an action to recover damages for a personal injury, evidence as to the machines in other like factories, upon the question of whether the one causing the injury was of as safe a character as those approved and in general use, is competent. *Sutton v. Melton,* 369.

4. *Same—Nonsuit—Trials.*—Where there is evidence that a machine at which the plaintiff was injured while in the course of his employment was not of the kind as those approved and in general use for the same character of work, and that an imperfection in the machine caused the injury, a motion as of nonsuit is properly denied. *Ibid.*

5. *Same—Minors—Instruction to Employee—Duty of Employer—Warnings.*—The plaintiff, a boy of fifteen years of age, was employed to work at a power-driven machine, and was alleged to have been

EMPLOYER AND EMPLOYEE—*Continued.*

injured by the negligence of the defendant, of which there was evidence on the trial, and, among other things, that the boy was not instructed by his employer, the defendant, as to its proper operation: *Held*, it was the duty of the defendant to have previously given to plaintiff such warning and instruction as was reasonably required by his youth, inexperience, and want of capacity to enable him, with the exercise of ordinary care, to perform the duties of his employment, under the existing conditions, with reasonable safety to himself. *Ibid.*

6. *Employer and Employee—Master and Servant—Dangerous Instrumentalities—Duty of Master.*—It is the duty of the employer to select a power-driven machine, at which his employee is required to work in the performance of his duties, with reasonable care and prudence as to its safety, and it is actionable negligence where the employer has failed to select one that is reasonably safe for the work to be done, or one that he knew to be defective, or where he should have known it in the exercise of ordinary care, and the defect proximately caused the injury complained of in the employee's action. *Ibid.*

7. *Same — Contributory Negligence — Questions for Jury — Instructions—Trials.*—Where the evidence tends to show that the plaintiff defendant's employee has proximately caused the injury alleged by the negligence of the defendant in failing to furnish a reasonably safe machine with which the plaintiff should do dangerous work, the question of the plaintiff's contributory negligence, if pleaded and relied on, is ordinarily for the determination of the jury, under proper instructions from the court. *Ibid.*

8. *Employer and Employee—Master and Servant—Safe Place to Work—Youthful Employees—Warnings—Instructions—Supervision.*—It is required of the employer of labor to exercise ordinary care in providing them a reasonably safe place to work, and especially to warn and instruct those who are youthful and inexperienced concerning the risks and dangers which import menace of serious injury, and to provide adequate supervision when conditions are such as to require it. *Bellamy v. Lumber Co.*, 433.

9. *Same—Negligence—Evidence—Nonsuit—Trials.*—The owner of a lumber plant, a corporation, used in connection with its plant a slide to haul up the logs from the water. There was evidence tending to show that where this slide entered the water the water was knee deep, and waist deep where it ended; and beyond was the channel of the river some twenty or thirty feet deep; that the plaintiff's intestate was a boy about 15 years of age, and inexperienced, and while at work under the defendant's superintendent in repairing this slide, the superintendent left the intestate, with other boy employees, in the water to clear out the bottom and old boards at the foot of the slide, directing them to stay there until his return, but without warning or instructing them as to their danger: that the plaintiff could not swim with the clothes or shoes he necessarily was wearing in the performance of his duties, and in the absence of the superintendent was seen to fall forward and was carried out by the rising river, and was drowned. Upon defendant's motion as of nonsuit: *Held*, sufficient as to the actionable negligence of the defendant to take the case to the jury. *Ibid.*

EMPLOYER AND EMPLOYEE—*Continued.*

10. *Employer and Employee—Master and Servant—Tools and Appliances—Duty of Employer.*—While not an insurer, the employer who furnished tools or appliances to his employee with which to do his work, is required to exercise that degree of care in furnishing them which he would exercise in similar circumstances for his personal safety, under the rule of the prudent man. *Gaither v. Clement*, 450.

11. *Same—Simple Tools.*—The rule of the employer's liability when furnishing simple tools to his employee with which to perform his services generally refers to his actual or constructive knowledge of defects therein from which an injury may reasonably be expected to result, and which did result therefrom. *Ibid.*

12. *Same—Delegated Duty—Alter Ego.*—The duty devolving upon the employer to exercise due care to furnish his employee a reasonably safe place to work and reasonably safe tools and appliances with which to perform his duties, is not delegable, and another acting for him therein does so as his *alter ego*. *Ibid.*

13. *Employer and Employee—Master and Servant—Negligence—Contributory Negligence—Evidence—Questions for Jury—Trials.*—Where there is evidence that the employer has furnished his employee a defective or improper drill with which to do his work, and that while tapping on it with a hammer to dislodge it from a place it had been used in obedience to instructions from his superior, a substance flew therefrom and injured the employee's eye, for which damages are sought in his action: *Held*, it was for the jury to determine the question of accident, causal relation, whether the plaintiff had only assumed that the injury was caused by a particle of steel from an imperfect drill, or whether the proximate cause was the plaintiff's negligent use of the hammer, under the circumstances. *Martin v. Mfg. Co.*, cited and distinguished. *Ibid.*

14. *Same—Proximate Cause.*—Where there is evidence tending to show that the plaintiff, an employee acting under the instruction of his employer or his *alter ego*, was injured by striking an imperfect drill furnished him to do his work, and in the course of his employment, with a hammer, by a particle flying from the drill into his eye, the question of proximate cause is one for the jury, under conflicting evidence. *Ibid.*

15. *Same—Inspection—Instructions.*—In an action to recover damages by the employee for the negligence of his employer to furnish him a safe tool with which to do his work, and the want of care of the plaintiff to inspect it is relied upon as a defense: *Held*, the plaintiff had the right to assume that the defendant had furnished him a proper tool, and a requested instruction offered by the defendant that omits all reference to the plaintiff's exercise of due care under the circumstances, is properly refused. *Ibid.*

16. *Employer and Employee—Master and Servant—Negligence—Duty of Employer—Tools and Appliances—Instructions—Ordinary Care—Appeal and Error.*—The duty of the employer to furnish his employee safe tools with which to perform his services, and a safe place to do so, depends upon the exercise by him of ordinary care in providing

EMPLOYER AND EMPLOYEE—*Continued.*

them, and an instruction that imposes upon the employer an absolute duty to furnish them, without qualification, leaving out the ordinary care required of him in their selection, is reversible error. *Ibid.*

17. *Employer and Employee—Master and Servant—Negligence—Instructions—Duty of Employer—Safe Place to Work.*—The duty of an employer to provide his employee a safe place to work extends only to his exercise of ordinary care, and an instruction in the employee's action for damages alleged to have been caused by the negligence of the defendant therein, is reversible error, which omits this as an element in the standard of duty, and in effect makes the duty an absolute and unconditional one. *Tritt v. Lumber Co.*, 830.

EQUALITY. See Parent and Child, 2.

EQUITY. See Eminent Domain, 3; Costs, 1, 2; Trusts, 1, 3, 5; Trespass, 1; Actions, 2; Appeal and Error, 20; Banks and Banking, 3; Instructions, 10, 12.

Equity—Injunction—Receivers—Courts—Discretion.—Where, in a suit in the nature of a creditor's bill, the plaintiffs applied for injunctive relief and the appointment of a receiver, the court may continue to the hearing the preliminary injunction and dismiss the temporary receivership, the latter being within his discretion and properly exercised, especially when it appears that the receivership was for property greatly disproportionate in value to the amount demanded in the action. *Thompson v. Pope*, 123.

ERASURES. See Banks and Banking, 4.

ESCROW.

1. *Escrow—Bills and Notes—Negotiable Instruments—Evidence—Parol Evidence—Contracts.*—The maker of a negotiable note may show, as between the original parties, a parol agreement that the payee had accepted it to be valid only upon the happening of a certain event, and in violation thereof had transferred it to an innocent purchaser for value, in due course, in his action to recover the amount of the note that he had been forced to pay to the holder, when the agreement resting in parol does not vary, alter, or contradict the written terms of the instrument. *White v. Fisheries Co.*, 228.

2. *Same—Vary, Alter, or Contradict.*—It may not be shown by parol that a negotiable note was to be held in escrow in contradiction of its express written terms that the payee may cash it before maturity, and the maker would pay it when it should become due. *Ibid.*

3. *Escrow—Evidence—Fraud—Appeal and Error—Questions for Jury.*—Where there is allegation and evidence that the defendant had fraudulently negotiated a note in violation of a parol agreement that it should be held in escrow, to the loss of the plaintiff in being compelled to pay the note in the hands of a purchaser for value in due course, it is reversible error for the trial judge to refuse to submit the issue of fraud and have only that relating to the establishment of the escrow relied upon by the plaintiff, which was answered by the jury for defendant under a peremptory instruction. *Ibid.*

ESTATES. See Husband and Wife, 7, 8; Parent and Child, 3; Wills, 5, 6, 9; Game, 5; Guardian and Ward, 1; Removal of Causes, 4.

1. *Estates—Estates Tail—Children—Statutes—Fee—Wills.*—A devise of land to testatrix's daughter "and her children," the daughter never having had children born to her, conveys an estate tail to the daughter, converted by the statute into a fee-simple title, which she may convey in fee. *Cole v. Thornton*, 180 N. C., 90, cited and applied. *Masters v. Randolph*, 3.

2. *Estates—Heirs—Rule in Shelley's Case.*—A devise of an estate to each of the testator's children "as long as they may live and after their death to their heirs," passes to each a fee-simple interest under the rule in *Shelley's case*. *Wallace v. Wallace*, 181 N. C., 158, cited and applied; *Mills v. Thorne*, 95 N. C., 332, distinguished. *Curry v. Curry*, 83.

3. *Estates—Determinable Fee—Rule in Shelley's Case—Deeds and Conveyances.*—In construing a deed, a distinction should be observed between a determinable fee and an estate created under the rule in *Shelley's case*, and this rule has no application where there is no limitation in the deed by way of remainder, as where an estate is granted to M., and her bodily heirs. *Willis v. Trust Co.*, 267.

4. *Estates—Determinable Fee—Contingent Remainders—Deeds and Conveyances.*—Where an estate is granted to M., and the heirs of her body in the premises, with warranty to her and the heirs of her body: *Held*, the intent of the grantor by proper construction was to limit over the estate to M. in case she should die without issue or bodily heirs. *Ibid.*

5. *Same—Shifting Uses—Statutes.*—An estate to M. and her bodily heirs is converted into a fee simple under our statute, C. S., 1734, without further limitation, but followed by the words "if no heirs, said lands shall go back to my estate," the estate will go over to the heirs of the grantor at the death of M., upon the nonhappening of the event as a shifting use under the statute of uses, 27 Henry VIII., ch. 10; C. S., 1740, whereunder a fee may be limited after a fee, by deed, and under the provisions of C. S., 1737, that every contingent limitation in a deed or will made to depend upon the dying of any person without heir or heirs of the body, or issue, shall be held to be a limitation to take effect when such person dies not having such heir, or issue, or child living at the time of his death. *Ibid.*

6. *Estates—Contingent Remainders—Statutes—Sales—Proceeds.*—It was not the purpose of C. S., 1744, authorizing a sale of land in certain instances whenever there is a vested interest in the same, with a contingent remainder over to persons who are not in being, or when the contingency has not yet happened which will determine whom the remaindermen are, to destroy the interest of the remote contingent remaindermen, but to enable the present owners to sell the property and make a good title to the same, and to require that the proceeds be held as a fund, subject to the claims of persons who may ultimately be entitled thereto, and safeguard their rights in all respects. *Poole v. Thompson*, 588.

7. *Same — Actions — Proceedings—Parties—Guardian ad Litem.*—Where lands are affected with a contingent interest in remainder, not de-

ESTATES—*Continued.*

terminable during the life of the tenant for life, the holder of the vested interest and those in immediate remainder may proceed to have the lands sold under the provisions of C. S., 1744, and have those remotely interested represented by guardian *ad litem* for the protection of their interests; and where it is made to appear that the interest of all parties require, or will be materially enhanced by it, the court may order a sale of the property, or any part thereof, for reinvestment, either in purchasing or improving real estate, etc., or invested temporarily to be held under the same contingencies in like manner as the property ordered to be sold. *Ibid.*

8. *Same—Private Sales—Public Sales.*—Where the sale of land affected with remote contingent interests not ascertainable at the time, comes within the provisions of C. S., 1744, the court having jurisdiction may order the property disposed of either at a public or private sale, when it is shown that, as to the one or the other, the best interests of the parties will be promoted, subject always to the approval of the court. *Ibid.*

9. *Same—Confirming Invalid Sales—Judgment.*—Where the present owners of land for life and in remainder have attempted to convey a fee-simple title to lands affected with remote contingent interests, without resorting to the proceedings allowed by C. S., 1744, which were applicable to the transactions, and thereafter these proceedings are properly brought, having the guardian *ad litem* appointed, as required, and the petition filed sets forth the sale previously made, the entire investment realized and held from the proceeds thereof, and subjects such investments and their ownership and control to the orders and judgment of the court in the cause, and allege and show that the sale was for the full value of the property, highly advantageous to all parties in interest, and that in fact it was necessary owing to liens for taxes, assessments, etc., on the land: *Held*, the court having jurisdiction of the parties and the property may enter a valid judgment confirming and authorizing the sale, and directing that the fund be properly safeguarded and invested, and the remote contingent interests safeguarded as the statute requires. *Ibid.*

10. *Estates—Contingent Remainders—Statutes—Sales—Bond—Appeal and Error.*—In all cases where property affected with unascertainable contingent remainders is ordered sold under the provisions of C. S., 1744, it is now required by the amendatory act of 1919, chapters 17 and 259, that a bond be given to assure the safety of the funds arising from the sale; but where this is omitted from a judgment otherwise regular, it will not affect the title conveyed, though the decree should be modified in that respect by proper steps taken in the Superior Court. *Ibid.*

ESTATES TAIL. See Estates, 1.

ESTOPPEL. See Trusts, 4; Actions, 3; Judgments, 2; Principal and Agent, 1.

EVICTION. See Covenants, 1.

EVIDENCE. See Actions, 4; Appeal and Error, 3, 9, 13, 15, 24, 29, 30, 36, 37, 38, 40, 44; Boundaries, 2, 4, 6; Negligence, 1, 2, 3, 7, 10, 15, 21; Escrow, 1, 3; Railroads, 1, 2; Courts, 5, 8; Seduction, 3; Wills, 1, 2, 4; Carriers,

EVIDENCE—*Continued.*

3, 8; Contracts, 4, 9, 15, 17, 20; Trials, 1, 4; Instructions, 1, 12; Executors and Administrators, 11; Insurance, Life, 2; Parent and Child, 4; Partnership, 1; Statutes, 4; Game, 7; Covenants, 3; Intoxicating Liquors, 2, 4, 12, 17, 20, 22, 23, 25; Attorney and Client, 2; Criminal Law, 10, 13, 14, 15, 16, 19, 23; Homicide, 2, 3, 4, 5, 6, 7, 8, 10, 12, 14, 19, 20, 21, 22, 23; Murder, 1; Receiving Stolen Goods, 1; Deeds and Conveyances, 6, 9; Easements, 1, 3; Employer and Employee, 3, 9, 13; Fires, 1; Automobiles, 1, 2; Payment, 1; Trespass, 4.

1. *Evidence—Pleadings—Admissions.*—Where the plaintiff has introduced in evidence allegations of the answer amounting to the admissions of distinct and separate facts relevant to the inquiry, it is not open to the defendant to put in evidence the remaining part of each paragraph, when they do not tend to explain or qualify the previous admissions. *Jones v. R. R.*, 176 N. C., 268, cited and applied. *Weston v. Typewriter Co.*, 1.

2. *Evidence — Deceased Persons — Statutes — Wills — Undue Influence—Transactions and Communications.*—The wife may testify that she was not aware that her deceased husband had made a will until after his death, as substantive evidence, and it is not objectionable under our statute as being of a transaction with a deceased person. C. S., 1795. *In re Bradford*, 4.

3. *Same—Third Persons.*—Where the will of the deceased husband in favor of his wife is contested, she may testify as a substantive, independent fact, not prohibited by our statute, excluding any dealings with her husband, that she had nothing to do with his making the will, it being in effect that she did not procure it through third parties, though this may indirectly tend to prove a transaction with the deceased. C. S., 1795. *Ibid.*

4. *Evidence—Declarations—Title.*—Declarations of pedigree for the purpose of showing title to lands will be excluded as evidence unless it can fairly be assumed that the declarant is disinterested. *Jelser v. White*, 126.

5. *Same—Ante Litem Motam.*—In order to introduce declarations as evidence of title to lands, it must affirmatively appear that the statements were made *ante litem motam*, or before the beginning of the controversy, and not alone at the time of bringing the suit, thus differing from an admission, which is the waiver of proof of a fact by a party to the action, as it may affect his cause. *Ibid.*

6. *Same—Obtained for Purposes of Suit.*—Where declarations have been obtained for the purpose of establishing the title to the lands in controversy in behalf of a party claiming as heir at law of the deceased owner, and to be used in a contemplated action, they are inadmissible on the trial, whether made against the interest of the declarant or *ante litem motam*, or otherwise. *Ibid.*

7. *Evidence—Trusts—Contracts—Questions for Jury—Trials.*—The purchaser at a public sale assigned his bid to a real estate company, which paid the purchase price under a written agreement that the land be sold, the purchase price repaid to it, with interest and expenses, and the profits divided in certain proportions, between itself and the assignor of the bid, and the land was thereafter sold at a profit: *Held*, the contract was one in the nature of a trust, and under

EVIDENCE—*Continued.*

its terms and the evidence in this case, the questions as to whether the real estate company should have sold the property itself and not have paid another company an apparently unreasonable price for such services, or whether, in fact, it had so paid it, these questions and the reasonableness of the charge, or the amount recoverable, were matters of fact for the jury to determine, with the burden of proof on the defendant, the real estate company. *Duguid v. Rasberry*, 134.

8. *Evidence—Motions—Court's Discretion—Appeal and Error—Weight of Evidence.*—A motion to set aside a verdict as being against the weight of the evidence is addressed to the discretion of the trial judge, and is not reviewable on appeal. *Ibid.*

9. *Evidence—Separate Causes of Action—New Trial as to One Cause—Appeal and Error.*—Upon allegation of two causes of action for breach of contract, one, the defendant's liability to pay the plaintiff the agreed price for grading tobacco, and the other the defendant's failure to furnish fertilizer as agreed: *Held*, the evidence in this case was sufficient to be submitted to the jury upon the second cause of action; and the jury having answered in the defendant's favor in the first cause, a new trial is awarded on the plaintiff's appeal, on his alleged second cause of action alone. *Butt v. Moore*, 158.

10. *Evidence—Character—General Reputation—Vendor and Purchaser.*—Where the purchaser has been sued for breach of his contract in wrongfully refusing to accept a carload of potatoes from the delivering carrier, and offers evidence tending to show that the potatoes were inferior in quality to those he had purchased, his character or reputation as a dealer in potatoes is properly excluded, and when he has testified in his own behalf, only his character by general reputation may be shown. *Merrill v. Tew*, 173.

11. *Evidence — Character — Civil Actions—Substantive Evidence—Wills—Devisavit Vel Non—Executors and Administrators.*—Upon the trial of a civil action the evidence as to the character of the parties who have taken the witness stand in their own behalf may ordinarily be received as affecting the credibility of their testimony, or may be corroborating and impeaching in its effect, but not as substantive evidence, and an instruction upon the trial of *devisavit vel non* that evidence as to the character of the witnesses, including the caveator, who had taken the witness stand, may be received as substantive evidence, is erroneous. The reason for the application of a different rule in actions for libel and slander, and in criminal actions, pointed out. *In re McKay*, 226.

12. *Evidence—Negligence—Damages—Tax Lists—Hearsay—Res Inter Alios Acta.*—Where the amount of the plaintiff's damage for the negligent burning of the plaintiff's dwelling is at issue, the amount on the tax list given by the plaintiff's predecessor in title is not admissible as tending to show the value of the building destroyed, it being but hearsay and *res inter alios acta*, and not the estimate of value given by the plaintiff. *Peterson v. Power Co.*, 243.

13. *Evidence—Nonsuit—Trials.*—The plaintiff's evidence on defendant's motion as of nonsuit thereon must be taken as true, and so considered, with all reasonable inferences to that effect which may be drawn therefrom. *Weathers v. Baldwin*, 276.

EVIDENCE—*Continued.*

14. *Evidence—Typewritten Letters—Libel.*—Where the plaintiff, in his action for libel, has found in his mail box an anonymous typewritten letter, addressed to him, and the defendant has admitted that "he was knowing to it," the opinion of an expert in such matters that the anonymous letter, from certain characteristics of type, punctuation, spacing between lines, and from the general form of the letters, was the same writing, by comparison, as one the defendant admits to be genuine, and evidently written on his machine, is competent as tending to show the defendant's responsibility for the libelous typewritten letter. *Hedgepeth v. Coleman*, 309.

15. *Evidence—Experts—Opinions—Instructions—Appeal and Error—Weight of Evidence.*—Where experts in typewriting have upon competent evidence, testified to their opinion that a libelous letter, the subject of the suit, was written by the defendant, the refusal of the trial judge to charge the jury that they should "scan with care the evidence of the expert before arriving at a conclusion that defendant wrote the letter complained of," is not error, testimony of this character falling within the general rule that expert testimony is subject to the same tests that are ordinarily applied to the evidence of other witnesses. *Buxly v. Buxton*, 92 N. C., 479, cited and distinguished. *Ibid.*

16. *Evidence — Declarations— Beneficial Associations—Beneficiary.*—In an action to recover funeral benefits from a fraternal order, declarations of the deceased as to his health made subsequently to the time of his enrollment, are not admissible as evidence against the beneficiary in his action against the benefit society. *Evans v. Junior Order*, 359.

17. *Evidence — Cross-examinations — Impeachment — Damages — Trials.*— Where the defendant corporation has denied the trespass and the wrongful cutting and removing timber upon the plaintiff's land, and its general manager has testified as to the comparative value of the timber, it is competent for the plaintiff to cross-examine him as to those matters to test the value of his testimony as to the value of the land, timber, etc., and also to show his animus, feeling, or bias. *Rutledge v. Mfg. Co.*, 430.

18. *Evidence — Deceased Persons — Statutes — Wills—Holograph Wills— Devisavit Vel Non.*—A witness interested in the result of a trial of *devisavit vel non* as to whether the holograph will of the deceased was found among her valuable papers and effects after her death, with evidence that it had been securely wrapped in and fastened to some clothes supposed to have been put aside by her for her shroud, addressed in a sealed envelope to three of the beneficiaries, her daughters, locked in her top bureau drawer where she was in the habit of keeping her purse and other effects, may testify to the fact as being within her own knowledge, that the deceased was not in the habit of keeping this drawer locked all of the time, testimony of this character not being prohibited under our statute as to transactions of communications with a deceased person. C. S., 1795. *In re Harrison*, 458.

19. *Evidence—Automobiles—License Plates—Ownership.*—Where the ownership of an automobile, causing damage to another by the negligent operation of its driver, is in question in the action, the license number

EVIDENCE—*Continued.*

or plate indicating that the defendant was the owner is competent as a circumstance tending to show his ownership, with other proof thereof. *Freeman v. Dalton*, 539.

20. *Evidence — Nonexpert — Opinion Upon the Facts.*—A nonexpert eye-witness may state his opinions upon the collective facts when a person not an eye-witness cannot form an accurate judgment thereof from descriptive detail. *S. v. Kincaid*, 709.

21. *Evidence—Dying Declarations.*—An exception to the admission of dying declarations, in an action for a homicide, that they were incomplete to the prejudice of the defendants, cannot be sustained, where the witness has testified to them in full, they were sufficient for the purpose of conviction with the other evidence, and the incompleteness objected to was caused by the dying condition of the declarant. *S. v. Brinkley*, 720.

22. *Evidence—Witnesses—Subpœnaed—Appeal and Error—Harmless Error.* Where, upon the trial for a homicide, the testimony of a witness for the defense has been excluded, refusal of the court to permit the defendants to show that this witness had also been subpœnaed by the State, and not introduced by it, is not reversible error. *Ibid.*

23. *Evidence—Witnesses Interested in Result—Instructions.*—Where the defendant's wife or other near relatives have testified in his behalf on a trial for manufacturing, etc., liquor, in violation of our statute, C. S., 3409, it is not error for the judge to charge the jury to receive their testimony with a degree of caution, to closely scrutinize and scan it, because of their interest in the verdict, when followed by the instruction to give it the same credibility as that of a disinterested witness if they were satisfied of its truth. *S. v. Smith*, 726.

24. *Evidence—Character—Reputation—Voluntary Restriction by Witness.* Where the defendant, being tried for violating our prohibition statutes, takes the stand, he puts his character in issue; and where a witness, in response to the solicitor's question, states that it is bad, and then voluntarily qualifies his answer by adding, "for selling liquor," the admission in evidence of this qualification is not erroneous. *S. v. Saleeby*, 740.

25. *Evidence—Opinion Upon the Facts—Intoxication—Automobiles—Criminal Negligence—Statutes.*—Where relevant as a part of the *res gestæ* upon the trial for manslaughter, for the criminally reckless driving of an automobile on a public highway (C. S., 2617, 2618), the impression of a witness from his own observation of the conduct and appearance of the defendant at the time, that the defendant was then under the influence of whiskey, is competent. *S. v. Jessup*, 772.

26. *Evidence — Corroborative—Criminal Law—Statutes—Children—Carnal Knowledge.*—Where the prosecutrix has testified upon the trial for the unlawfully carnally knowing or abusing an innocent female child over twelve and under fourteen years of age (C. S., 4202), her testimony in answer to the questions of the solicitor, to the effect that she had told her mother on the day of the occurrence, who was the only near relative present, is admissible for the purpose of corroborating her other testimony. *S. v. Winder*, 776.

EVIDENCE—*Continued.*

27. *Evidence—Witnesses—Cross-examination—Character—Impeaching Evidence—Criminal Law.*—It is competent for the solicitor in a criminal action to broadly cross-examine the defendant's witnesses upon their collateral testimony given on their direct examination, tending to discredit the State's witnesses, the limitation ordinarily being that they are not bound to answer questions that might subject them to an indictment or to a penalty under the statute. *Ibid.*

28. *Evidence—Nonsuit—Trials—Appeal and Error—Criminal Law—Statutes.*—Defendant's exceptions after he has introduced evidence, to the refusal to nonsuit the State in a criminal action, requires a consideration of the entire evidence on appeal. *S. v. Pasour*, 793.

29. *Evidence — Witnesses—Character—Instructions.*—Where the character of a witness has not been impeached either by contradictory evidence or the manner of his cross-examination, it is presumed to be good, and the testimony of other witnesses thereto will be excluded; and where in a criminal action the case has been given to the jury, who return to court with a request for a further instruction as to whether a witness's character is considered good until proven bad in court, the judge's reply that it is presumed to be good until the contrary is shown, is free from error under the circumstances. *S. v. Pugh*, 800.

30. *Evidence—Criminal Law—Forgery—Corroboration—Appeal and Error—Prejudice—New Trials.*—The defendant upon a trial for forgery offered evidence that he was a traveling salesman, and at the time and place charged was in another town, some five hundred miles distant, and in corroboration of his own and of that of others of his witnesses, offered as evidence an order signed by a customer at the latter place, and also testimony of his landlady there that the defendant and his wife had lodged at her hotel, identifying several checks he had given for their board. The court excluded the evidence as to the order for merchandise and testimony of the defendant's witness as to the date and the period of time for which the checks were given: *Held*, the evidence rejected was competent as tending to prove a pertinent circumstance in corroboration of defendant's testimony, and that of his other witnesses, and its exclusion by the court was reversible error. *S. v. Krout*, 804.

EXCEPTIONS. See Carriers, 6; Landlord and Tenant, 2; Eminent Domain, 10, 15; School Districts, 18; Appeal and Error, 32, 34, 35.

EXCHANGE. See Vendor and Purchaser, 1.

EXECUTION. See Deeds and Conveyances, 16, 20.

EXECUTORS AND ADMINISTRATORS. See Dower, 1; Evidence, 11; Actions, 2.

1. *Executors and Administrators—Account and Settlement—Actions.*—In this action for an accounting and final settlement by an executor: *Held*, a statement of account of debts and credits filed by the executor was not in the form of a regular final account, and further, the matters alleged were not more than an unfulfilled promise for a final settlement, and insufficient according to the requirements of the law as a final account. *Pierce v. Faison*, 177.

EXECUTORS AND ADMINISTRATORS—*Continued.*

2. *Same.*—Where an executor or administrator fails to file his final account for two years after his appointment, the law makes the demand for those entitled to the estate, and at the end of this period an action will lie at the instance of any one interested to have the executor or administrator account in settlement of the estate. *Ibid.*

3. *Same—Limitation of Actions.*—Where a person is interested as distributee or beneficiary in the estate of a deceased person, and fails to bring his action against the personal representative for ten years, his right of action is barred ten years from the expiration of the two years period in which he has failed to file his final account, as the law provided. *Ibid.*

4. *Same—Statutes—Interpretation.*—The statute barring the right of one having an interest in the estate of a deceased person after ten years, enacted by Laws 1891, ch. 113, repealing sec. 136 of The Code, applies to the right to an accounting by the executor or administrator, where the right existed theretofore, and the period prescribed by the statute has since run. *Ibid.*

5. *Same—Pleadings—Answer.*—Where those having an interest in the estate of a deceased person have failed to bring an action for an accounting and settlement within the period allowed by the statute of limitations, objection by the personal representatives can only be taken by answer. *Ibid.*

6. *Same—Trusts.*—Where the answer of the personal representatives of a deceased person have unsuccessfully pleaded the statute of limitations in an action for an accounting and settlement with those having an interest in the estate of the deceased, the defendant is liable to an accounting for any trust funds in his hands, not thus barred. *Ibid.*

7. *Same—Burden of Proof.*—The plaintiff having an interest in the estate of a deceased person has the burden of showing that the statute of limitations has not run in his action for an accounting and final settlement, when such statute is pleaded in the answer. *Ibid.*

8. *Same—Interpretation of Pleadings.*—The answer of the personal representative of a deceased person will be liberally construed in his favor to ascertain whether he has sufficiently pleaded the statute of limitations to an action brought against him for a final accounting and settlement of the estate of the deceased: *Held*, that the plea was sufficient in this case. *Ibid.*

9. *Same—Issues—Questions for Jury—Trials.*—Where the answer, in an action against the personal representative of a deceased, is sufficient to raise the plea of the statute of limitations, a question of fact is raised for the jury to determine. *Ibid.*

10. *Executors and Administrators—Account and Settlement—Limitation of Actions—Statutes.*—C. S., 445, limiting the time for the bringing of an action to ten years and applying to an action against an executor or administrator for a final accounting and settlement, is not affected by the provisions of C. S., 395, as to actions on their official bonds. *Ibid.*

11. *Executors and Administrators—Wills—Devisavit Vel Non—Evidence—Admissions.*—Admissions of the executor are generally incompetent against the devisees, upon the issue of *devisavit vel non*, especially

EXECUTORS AND ADMINISTRATORS—*Continued.*

when those sought to be introduced were made in the lifetime of the testator and necessarily before the relationship as executor has existed, or before he was acting in a representative capacity. *In re McKay*, 226.

12. *Same—Joint Interests.*—The interest of an executor in the will of the deceased upon the issue of *devisavit vel non* is distinctive from that of the devisees under the will who have a joint interest among themselves, and his declarations against their interests will not bind them, especially when those sought to be introduced in evidence were made in the lifetime of the testator. *Ibid.*

EXECUTORY CONTRACTS. See Contracts, 8.

EXEMPTIONS. See Marriages, 1.

EXHIBIT. See Mortgages, 3.

EXPRESS COMPANIES. See Carriers, 3, 7, 16.

EXPRESS TRUSTS. See Pleadings, 1.

EXPRESS WARRANTS. See Vendor and Purchaser, 2.

EXTENSION. See Appeal and Error, 47; Sheriffs, 2.

FALSE PRETENSE. See Criminal Law, 5.

FEDERAL COURTS. See Courts, 4.

FEDERAL EMPLOYERS LIABILITY ACT. See Railroads, 4, 7; Carriers, 17.

FEDERAL STATUTES. See Statutes; Carriers, 11, 16; Intoxicating Liquors, 5, 9; Judgments, 14.

FEE-SIMPLE TITLE. See Estates, 1; Husband and Wife, 8.

FEES. See Attorney and Client, 2; Judgments, 16; Sheriffs, 1.

FELLOW SERVANT. See Employer and Employee, 2.

FELONY. See Elections, 2, 3; Intoxicating Liquor, 7, 11.

FERTILIZER. See Contracts, 11; Constitutional Law, 11.

FINDINGS. See Appeal and Error, 9, 20, 27, 29, 30, 31, 32, 34, 35, 36; Husband and Wife, 3; School Districts, 16; Judgments, 10, 14; Jury, 1.

FIRES. See Railroads, 2; Damages, 1; Negligence, 7.

1. *Fires—Negligence—Employer and Employee—Master and Servant—Evidence—Instructions—Nonsuit—Trials.*—Where the owner of land built a fire on his pasture himself, or by his servants or agents, and there is evidence that a strong wind carried sparks and set fire to a woods adjoining the pasture from whence it was communicated to the plaintiff's land to his damage, and that the owner had instructed his servants or agents to put out the fire, which they had disobeyed,

FIRES—*Continued.*

the case presents a mixed question of law and fact, the jury to find the facts under a correct instruction of the court as to the law; and the granting of a motion as of nonsuit is erroneous. *Gibbon v. Lamm,* 421.

2. *Same—Proximate Cause.*—Where the owner of land builds a fire on his own premises, it is required of him to exercise the care of an ordinary prudent man to prevent its communication to adjoining lands under the existing circumstances, whether through the air or along the ground, and he is also liable for the negligence of his servants or agents whom he has left in charge, when his own, or their negligence attributable to him, is the proximate cause of the damage to the lands of adjoining owners, or to others beyond, to which the fire has been communicated, the question of proximate cause being a question for the jury under proper instructions from the court. *Ibid.*

FORECLOSURE. See Cities and Towns, 8; Trusts, 2.

FORFEITURE. See Insurance, Life, 1; Beneficial Associations, 2; Landlord and Tenant, 3.

FORGERY. See Evidence, 30.

FRAUD. See Injunction, 3, 6, 9; Pleadings, 1; Trusts, 1, 3; Carriers, 4; Criminal Law, 1; Escrow, 3; Banks and Banking, 2; Parties, 1; Appeal and Error, 31.

FREIGHT. See Carriers.

FUNCTUS OFFICIO. See Taxation, 1.

GAME.

1. *Game—Hunting—Statutes.*—The legislative power to enact game laws upon the principle that game does not become private property until reduced to possession, is binding upon the owners of land and all others, and, subject thereto, such owners have the right to protect the game upon their own lands against trespassers thereon. *Council v. Sanderlin,* 253.

2. *Same—Deeds and Conveyances—Reservation of Privilege—Profit a Prendre—Venary.*—By deed, or other proper written conveyance, but not by parol, the owner of lands may convey the hunting privileges thereon under such terms as may be agreed upon, separate from the lands, under the principles applying to a *profit a prendre,* classified by Blackstone under the heading of "Venary," it being an estate in the lands to that extent, and not subject to revocation at the will of the owner. *Ibid.*

3. *Same—Rights and Remedies.*—The remedy of one whose hunting rights over the lands of another are being violated is, in proper instances, by suit for specific performance, by injunction, or by an action for damages. *Ibid.*

4. *Game—Definition.*—The ownership of the right to shoot for sport over the lands of another is not limited to game in a strict sense, but confers the right to shoot such animals as are ordinarily understood to be a subject of such sport. *Ibid.*

GAME—*Continued.*

5. *Game—Reservation of Privilege—Deeds and Conveyances—Estates.*—The privilege of hunting over the lands of another is such an estate therein as may be assigned by or inherited from the owner, when the grant does not otherwise determine the rights of the parties. *Ibid.*

6. *Same—Perpetuities.*—The right of one to hunt upon the lands of another is a present and not a future interest to which the rule against perpetuities is inapplicable. *Ibid.*

7. *Game—Deeds and Conveyances—Reservation of Privileges—Evidence—Letters.*—Where the wording of a grant of the right to hunt upon the lands of another is ambiguous, a letter written before the controversy arose, and with knowledge, by a former owner of the lands, may be introduced as evidence of weight when in the favor of the claimant of the right. *Ibid.*

8. *Game—Deeds and Conveyances—Reservation of Privilege—Leases—Rights of Grantee of Land.*—The owner of land conveyed it, reserving for himself, his heirs and assigns, the right to hunt over such portions as may remain uncleared and uncultivated, and to protect the game thereon against trespass of all persons except the grantee, his "executors, administrators and assigns": *Held,* the hunting rights of the grantor over the portion designated did not exclude the right of the grantee and his successors while they owned the lands to hunt thereon themselves, but a lease made by the latter of the hunting privileges was invalid as an invasion of the right which the grantee had reserved. *Ibid.*

GARBAGE. See Municipal Corporations, 2.

GASOLINE. See Negligence, 1.

GOVERNMENT. See Eminent Domain, 4; Constitutional Law, 12; Covenants, 5; Municipal Corporations, 1.

GRAND JURY. See Criminal Law, 9.

GUARDIAN AD LITEM. See Estates, 7.

GUARDIAN AND WARD.

1. *Guardian and Ward—Courts—Jurisdiction—Removal of Estate—Foreign Guardian—Statutes.*—Where a foreign guardian has been duly appointed in the state of his own residence and that of his wards, and has filed a certified copy of his appointment, with a bond sufficient both as to the amount and the financial ability of the sureties to protect the estate of his wards and in conformity with C. S., 2195, 2196, and the petition before the clerk of the court as required by these statutes, it is not required that a local guardian be appointed, but the court in this State, before which the matter is properly pending, may order that the foreign guardian be permitted to withdraw the estate of his wards to the place of foreign jurisdiction. *Cilley v. Geitner,* 528.

2. *Same—Real Property—Sales.*—Where a foreign guardian has complied with the provisions of C. S., 2195, 2196, which authorize him to withdraw the estate of his wards to the place of their residence and to a court of foreign jurisdiction, he may, in the same proceedings, and

GUARDIAN AND WARD—*Continued.*

incident thereto, have the real property of his wards sold and converted into money in conformity with the provisions of C. S., 2180, when the wards are represented therein by their next friend, and it is made to appear that their interests will be promoted thereby, etc. *Ibid.*

GUESTS. See Automobiles, 2.

HABEAS CORPUS. See Appeal and Error, 52; Courts, 6.

1. *Habeas Corpus—Appeal and Error—Certiorari—Courts—Discretion.*—An appeal will not lie upon the refusal of the judge, in *habeas corpus* proceedings, to release a prisoner from custody upon the ground that the judgment ordering her imprisonment was invalid, such procedure being only allowable when concerning the care and custody of children and otherwise by application for a writ of *certiorari*, the granting of which rests on the sound discretion of the court. *In re McCade*, 242.

2. *Habeas Corpus—Appeal and Error—Certiorari—Constitutional Law.*—Except in cases concerning the care and custody of children, an appeal will not lie by the prisoner from the refusal of the judge in *habeas corpus* proceedings to liberate him, his remedy being to have the case reviewed by *certiorari*. Const., Art. IV, sec. 8. *S. v. Yates*, 753.

3. *Same—Appeal and Error—Dismissal—General Interest.*—The prisoner rearrested for violating the conditions of a parol, granted by the Governor after the term of his sentence had expired, sued out *habeas corpus* proceedings, and upon the denial of his claim of right to be set at liberty, appealed to the Supreme Court: *Held*, *certiorari* being the proper procedure, the appeal is dismissed, but its merits passed upon as being a question of public importance and general interest. *In re Sermon's Land*, 182 N. C., 127; *Cement Co. v. Phillips, ibid.*, 440. *Ibid.*

4. *Habeas Corpus—Statutes.*—The petitioner in *habeas corpus* proceedings adjudged in contempt of court shall, under the provisions of our statutes, be remanded when upon the hearing it is made to appear that he is held in custody by virtue of a process issued by a court or judge of the United States where such judge or court has exclusive jurisdiction; by virtue of a final judgment or decree of any competent court of civil or criminal jurisdiction or of any execution issued upon such judgment or decree; for any contempt, specially and plainly charged in the commitment by some court, officer, or body having authority to commit for the contempt charged; that the time during which such party may be legally detained has not expired. *S. v. Hooker*, 763.

5. *Habeas Corpus—Courts—Jurisdiction—Record.*—Where the petitioner in *habeas corpus* proceedings is held under a final sentence of a court, a commitment of contempt or other, the only questions open to inquiry at the hearing are whether on the record the court had jurisdiction of the matter and whether on the facts disclosed in the record and under the law applicable to the case in hand, the court has exceeded its powers in imposing the sentence whereof the petitioner complains. *Ibid.*

HABEAS CORPUS—*Continued.*

6. *Habeas Corpus—Legal Detention—Sentence—Valid in Part.*—Where a prisoner is detained by virtue of a sentence in part valid, and part otherwise, he may not be liberated on *habeas corpus* until he shall have served the valid portion of his sentence, and he shall be remanded when it appears that the time during which he may legally be detained has not expired. *Ibid.*

HARMLESS ERROR. See Criminal Law, 17; Evidence, 22; Homicide, 4, 9, 24; Instructions, 13; Trials, 4.

HEALTH. See Issues, 4.

HEARING. See Injunction, 13.

HEARSAY EVIDENCE. See Homicide, 4.

HEIRS. See Estates, 2.

HIGH SCHOOLS. See School Districts, 7.

HIGHWAYS. See Injunction, 13.

HIRING. See Courts, 2; Criminal Law, 1.

HOLOGRAPH WILLS. See Evidence, 18; Wills, 7.

HOMICIDE. See Appeal and Error, 58; Murder, 1; Arrest, 1, 2; Criminal Law, 23; Judgments, 6.

1. *Homicide — Murder—Arrest—Warrant—Instructions—Federal Prohibition Officers—Appeal and Error—Prejudicial Error.*—Where, on a trial for murder, there was evidence that the deceased, a national prohibition officer, and another specially deputized entered the premises of defendant and attempted to arrest the prisoner without a warrant for the unlawful distillation of liquor, when he was not actually engaged therein, and chased the prisoner with pistols drawn, and while fleeing, and in reasonably apparent danger of his life, the prisoner shot and killed the prohibition officer, an instruction to the jury that under the circumstances the deceased had the right to make the arrest without a warrant constitutes reversible error, for which a new trial will be granted on appeal. *S. v. Burnett*, 705.

2. *Homicide—Murder—Evidence—Appeal and Error—Husband and Wife.* Where, upon the trial of a homicide, the prisoner's guilt for killing his wife is made to depend upon whether he intentionally inflicted the wound that caused the death, or whether it occurred through misadventure, and there has been rendered a verdict of murder in the second degree, and there was plenary evidence that the prisoner was very drunk at the time, and that his conduct towards her had theretofore been "kind always," "friendly," "all right," the action of the trial judge in withdrawing from the jury the testimony of a witness that the defendant had been "very fond of his wife," *is held*, under the facts of this case, not to have been prejudicial error, entitling the defendant to a new trial, though competent as a nonexpert opinion upon the facts. *S. v. Kincaid*, 709.

3. *Homicide—Murder—Evidence—Husband and Wife—Intent.*—Where the defense of the prisoner, on trial for the capital felony of murder of his wife, is that their relationship had always been kind, considerate, etc., and that the homicide was not intentional, but the result of a

HOMICIDE—*Continued.*

misadventure when he was very drunk, etc., not knowing what he did, it is competent for the State to show that for seven years prior to the homicide the prisoner had maltreated his wife from time to time, and had addressed her with abusive language, the admissibility of such evidence being a matter of law, and its weight of credibility being for the jury. *Ibid.*

4. *Homicide — Murder—Husband and Wife—Evidence—Admissions—Appeal and Error — Hearsay Evidence — Rumors—Harmless Error.*—Where, upon the trial for wife-murder, the witnesses have erroneously been permitted to testify that the general reputation was that the defendant had been convicted of seduction, and there was evidence, material to the inquiry, that his relationship to his wife had always been kind, etc., the subsequent admission of the husband that he had been convicted of seduction, renders the error harmless. *Ibid.*

5. *Homicide — Evidence — Dying Declarations — Conspiracy — Nonsuit.*—Where, upon the trial of two defendants for murder, there is evidence that one of them struck the deceased with a rock that caused his death, in the presence of the other, with circumstances tending to show that the other was aiding and abetting the assault, with evidence of the dying declaration of the deceased, "Boys, you have killed me; I did not think you would do it," a motion of defendants to dismiss is properly refused. *S. v. Brinkley*, 720.

6. *Homicide—Criminal Law—Deadly Weapon—Evidence—Matters in Excuse—Burden of Proof.*—Where, upon the trial of murder, it is admitted by the defendant, or established as a fact, that, with a deadly weapon, he struck the blow that resulted in death, the law presumes malice, and the burden then rests upon the defendant, throughout the trial, to show such facts or circumstances as will reduce the degree of the offense, or acquit him thereof. The rule as to the burden of proof in civil actions does not apply. *Ibid.*

7. *Homicide — Murder—Criminal Law—Evidence—Deadly Weapon—Conspiracy—Manslaughter—Trials.*—The evidence on this trial for murder that the deceased had money which he lost to the two defendants while gambling with them at their invitation, the quarrel between him and defendants, their withdrawal together, the deceased walking between them, the infliction of the mortal wound by one of the defendants, and the dying declaration of the deceased, "Boys, you have killed me," *is held* sufficient, with the other evidence, of a conspiracy between the defendants, and to convict the one striking the mortal blow of murder in the second degree and the other of manslaughter. *Ibid.*

8. *Homicide—Murder—Evidence—Conspiracy.*—Where a conspiracy to commit the homicide accomplished has been proven on the trial, the acts and declarations of each defendant in furtherance of the common illegal design are competent against both. *Ibid.*

9. *Same—Appeal and Error—Harmless Error.*—Where, upon a trial for conspiracy resulting in death, it is established that one of the two defendants killed the deceased with a deadly weapon in the presence of the other, without just provocation or show of resistance, the dying declaration of the deceased that he had no knife is consistent with the position that none was used, and its exclusion is not prejudicial error. *Ibid.*

HOMICIDE—*Continued.*

10. *Homicide — Murder — Manslaughter—Evidence—Intent—Conspiracy.*—Where, upon the trial of murder, it is admitted that one of the defendants struck the fatal blow with a deadly weapon, in the presence of the other, who was aiding and abetting him, it is permissible for the jury to find for their verdict that the one who struck the blow was guilty of murder, and that the other, being without the intent to kill, was guilty of the less offense of manslaughter. *Ibid.*

11. *Homicide — Murder — Deadly Weapon—Admissions—Implied Malice—Evidence—Nonsuit.*—Where the defendant on trial for homicide admits he fired the fatal shot, malice is implied, and nothing else appearing, the killing constitutes murder in the second degree, placing the burden on defendant to show to the satisfaction of the jury facts and circumstances sufficient to excuse the homicide or to reduce it to manslaughter, and defendant's motion as of nonsuit is properly disallowed. *S. v. Pasour*, 793.

12. *Homicide—Murder—Evidence.*—Where the brother of the accused on trial for a homicide has testified as to certain "scratches" on the body of the deceased, evidence of the State tending to contradict and impeach him is competent. *Ibid.*

13. *Same—Appeal and Error—Unanswered Questions.*—Upon this trial for homicide the indication by the witness of the one of several brothers who had admitted killing their father was competent, and, upon the record, evidence as to any peculiarity of the deceased a short time before being killed was irrelevant and remote, and also not considered on appeal when it is not shown what the proposed answer of the witness would have been to the question asked him. *Ibid.*

14. *Homicide—Murder—Evidence.*—Upon this trial for homicide the evidence of premeditation and deliberation in the defendant's killing the deceased with a deadly weapon, *is held* sufficient to sustain a verdict of murder in the first degree, and no error is found in the trial in the court below. *S. v. Benson*, 795.

15. *Same — Premeditation and Deliberation — Manslaughter — Justifiable Homicide.*—The killing of a human being with malice, and with premeditation and deliberation, constitutes murder in the first degree, the element of premeditation being the thought beforehand for some length of time, however short; and that of deliberation, the execution of the preconceived intent, in cold blood, in furtherance of a fixed design to gratify a feeling of revenge or to accomplish some unlawful purpose, and not under the influence of a violent passion suddenly aroused by some lawful or just cause or legal provocation. *Ibid.*

16. *Same—Malice.*—Murder in the second degree is the unlawful killing of a human being with malice, but without the elements of premeditation and deliberation; and malice is that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse of justification, and will be implied in law by the killing with a deadly weapon. *Ibid.*

17. *Same—Burden of Proof—Satisfaction of Jury.*—The unlawful killing of a human being without either malice, premeditation or deliberation is manslaughter, and where the killing with a deadly weapon is established, the burden is on the defendant to show to the satisfaction of

HOMICIDE—*Continued.*

the jury, but neither by the preponderance of the evidence, nor beyond a reasonable doubt, the lack of the elements of malice, or the absence of all elements of crime necessary to establish his justification in taking the life of the deceased. *Ibid.*

18. *Homicide—Murder—Premeditation and Deliberation—Assault—Threats—Abusive Language.*—Language however abusive will not alone reduce the offense of murder to manslaughter, when such does not amount to an actual or threatened assault, but where the deceased has unlawfully assaulted the prisoner against his will, who then killed him in the heat of passion caused by the assault, the act of killing is homicide. *Ibid.*

19. *Homicide—Murder—Criminal Law—Evidence—Drinking—Self-defense.* On a trial for homicide there was evidence tending to show that the defendants concealed liquor they were carrying in a sack on seeing the sheriff and his posse approaching along the highway, and that the sheriff and one of his posse were killed by a pistol shot as he was trying to identify the defendants as others for whom he had a warrant of arrest: *Held*, evidence of the reckless conduct of the prisoners in the presence of a woman and her child at the home of the deceased member of the posse after the killing was competent under the facts of this case to show the defendants had been drinking and were in a reckless humor. *S. v. Hall*, 806.

20. *Homicide—Murder—Evidence—Self-defense.—Held*, on the evidence, it was competent for the State to show the number of pistol shots heard at the time, in connection with the number of empty shells found in the defendant's pistol, upon the question whether the prisoner fired in self-defense upon being arrested by the deputy sheriff. *Ibid.*

21. *Homicide—Murder—Sheriffs—Arrest—Warrant—Evidence.*—Where in a trial for homicide there is evidence tending to show that the sheriff was unlawfully killed in arresting the defendant, while endeavoring to identify him as the one for whom he had a warrant, it is competent for the State to show that the sheriff had the warrant at the time, upon the question of his *bona fides* in so acting. *Ibid.*

22. *Homicide—Murder—Evidence—Intoxication.*—Where a deputy sheriff has been killed by the defendant while making an arrest to find out whether he was the one for whom the officer had a warrant, evidence that the defendant had a quantity of whiskey in a sack, which he tried to hide upon seeing the officer, and as to the witness finding the sack afterwards, is material evidence, when it tends to explain the subsequent conduct of the defendant in committing the homicide. *Ibid.*

23. *Homicide—Murder—Evidence—Dying Declarations.*—A written statement purporting to be a dying declaration, must be shown to have been those uttered by the deceased, by competent testimony and under conditions that will cause them to come within the principles upon which testimony of this character is permissible. *Ibid.*

24. *Same—Appeal and Error—Harmless Error.*—The refusal of the trial judge to permit the introduction of dying declarations in a trial for homicide is not reversible error when the evidence rejected does not contradict or vary testimony of this character introduced by the State. *Ibid.*

HUNTING. See Game, 1.

HUSBAND AND WIFE. See Wills, 3, 4; Deeds and Conveyances, 8; Limitation of Actions, 3; Homicide, 2, 3, 4; Larceny, 2.

1. *Husband and Wife—Domestic Relations—Subsistence of Wife—Statutes—Court's Discretion.*—The amount allowed for the reasonable subsistence, costs, and attorney's fees to the wife in her proceedings against her husband under the provisions of C. S., 1667, is within the sound discretion of the judge hearing the same and having jurisdiction thereof. *Anderson v. Anderson*, 139.

2. *Same—Abuse of Court's Discretion.*—The restrictions imposed upon the judge in making an allowance to the wife for alimony in suits for divorce, C. S., 1665, do not apply to the exercise of his sound discretion in proceeding under the provisions of C. S., 1667, by the wife to obtain a reasonable subsistence, costs, and counsel fees from her husband. *Ibid.*

3. *Same—Admission—Findings of Fact.—Held*, from the admissions of the husband of his acts of adultery, his abandonment of his wife, and from the facts found by the judge in these proceedings of the wife for a reasonable subsistence, costs, and counsel fees, under the provisions of C. S., 1667, the amount allowed by the judge will not be held as unreasonable on appeal, or as exceeding the sound discretion given him by the statute. *Ibid.*

4. *Husband and Wife—Domestic Relations—Subsistence of Wife—Orders—Judgments—Modification of Orders—Statutes.*—Where, within the exercise of his sound discretion, the Superior Court judge, having jurisdiction, has allowed the wife a reasonable subsistence, attorney's fees, etc., in her proceedings under the provisions of C. S., 1667, the order of allowance may be thereafter modified or vacated as the statute provides, upon application to the proper jurisdiction for the circumstances to be inquired into and the merits of the case determined. *Ibid.*

5. *Husband and Wife—Domestic Relations—Subsistence of Wife—Alimony—Divorce—Statutes.*—While as to technical alimony the ordinary rule is that the title to the property designated, to enforce the order of the court remains in the husband, and it will revert to him upon reconciliation with or the death of the wife, this rule does not apply to an allowance for the reasonable support of the wife, etc., under the provisions of C. S., 1667; and the words used in the beginning of this section, "alimony without support," will not be construed to give the words "reasonable support" for the wife, the meaning of technical alimony. *Ibid.*

6. *Same—Order Securing Alimony.*—Technical alimony is the allowance made to the wife in suits for divorce, and may be secured by a proportionate part of the husband's estate judicially declared; or if he have no estate, it may be "made a personal charge against him," and it materially differs from a reasonable subsistence, etc., allowable in the wife's proceedings under the provisions of C. S., 1667, where a divorce is not contemplated, and where, in accordance with the statute, the order allowing her such subsistence may secure the same out of the husband's estate. *Ibid.*

HUSBAND AND WIFE—*Continued.*

7. *Same—Estate of Husband.*—The husband's estate, from which the court may secure its order allowing a reasonable subsistence, etc., to the wife in her proceedings under the provisions of C. S., 1667, includes within its meaning income from permanent property, tangible or intangible, or from the husband's earnings. *Ibid.*

8. *Husband and Wife—Wife's Subsistence—Estates—Contingencies—Defeasible Fee—Marriage—Domestic Relations.*—Where the judge, in the proceedings of the wife for an allowance of a reasonable subsistence, has impressed a trust upon the husband's land for the enforcement of the decree, the fact that in a part of the land he has only a defeasible fee, cannot prejudice him, and his exception on that ground cannot be sustained. *Ibid.*

9. *Husband and Wife—Marriage—Contracts—Services of Wife—Promise to Pay—Quantum Meruit.*—For the wife to recover for services rendered to her husband in his business, or outside of her domestic duties, while living together under the marital relation, there must be either an express or an implied promise on his part to pay for them; and the relationship of marriage, nothing else appearing, negatives an implied promise on his part to do so. *Dorsett v. Dorsett*, 354.

IDENTITY. See Arrest, 1.

IMPEACHMENT. See Evidence, 17, 27.

IMPLICATION. See Homicide, 1.

IMPLIED WARRANTY. See Vendor and Purchaser, 1.

IMPROVEMENTS. See Cities and Towns, 2.

INADVERTENCE. See Instructions, 11.

INCOMES. See Constitutional Law, 3.

INDEBITATUS ASSUMPSIT. See Banks and Banking, 2.

INDICTMENT. See Criminal Law, 10, 19; Intoxicating Liquors, 18; Larceny, 1; Receiving Stolen Goods, 1.

INDORSEMENT. See Banks and Banking, 2.

INFERIOR COURTS. See Constitutional Law, 19; Judgments, 13.

INJUNCTION. See Eminent Domain, 3, 12; Equity, 1; School Districts, 14; Taxation, 1.

1. *Injunction—Issues of Fact—Mortgages.*—Where the purpose of the action is to enjoin the sale of lands under a deed in trust or mortgage, and upon the hearing before the judge, upon the injunctive remedy sought, the affidavits are conflicting upon the question at issue as to whether the mortgage debt had been paid, the injunction should be continued to the hearing to ascertain the facts involved. *Sanders v. Ins. Co.*, 66.

2. *Injunction—Corporations—Nonresidents — Undertakings — Contracts — Parties.*—Where, in an action against a contractor and subcontractor, it is admitted that the latter is a nonresident corporation, and is

INJUNCTION—*Continued.*

about to remove the remainder of its property from the State, and it is alleged that it owes the plaintiff in a certain sum, and it appears that the contractor has admitted service of summons and entered an appearance, and owes its codefendant money in a sum little more than the amount in suit, an order restraining the defendant contractor from paying over to its codefendant subcontractor, the moneys due it under the subcontract, is properly granted; and a provision in the order that the restraining order should automatically cease upon the subcontractor giving a bond in a certain sum in lieu thereof, and that the plaintiff also give bond to assure the defendants' costs and expenses was properly entered under the circumstances. *Engstrum v. Gas Engine Co.*, 79.

3. *Injunction—Issues—Fraud—Trials.*—Where the plaintiff has sufficiently shown that he is entitled to the injunctive relief sought in the action, all collateral matters as to fraud, etc., are properly continued to be determined with the other issuable matters of fact at the trial. *Ibid.*

4. *Injunction—Judgment—Pleadings—Issues of Fact—Questions for Jury—Trials.*—Upon the hearing by the judge upon the question of continuing a restraining order to the hearing, the judge, upon proper findings, may dissolve the temporary order, but in doing so it is error for him to also determine an issue of fact, material to the rights of the parties, and which should be reserved for the jury to pass upon at the trial. *Sutton v. Sutton*, 128.

5. *Same—Deeds and Conveyances—Mental Capacity.*—Upon the hearing by the judge of a motion to continue a preliminary restraining order to the hearing, the title to lands was made to depend, by the pleadings, upon the mental capacity of the grantor to make a valid deed to the *locus in quo*: *Held*, though the restraining order was properly dissolved under the facts appearing in this case, it was reversible error for the judge to incorporate in his order an adjudication of title, as this involved an issue as to the fact for the jury to determine at the trial. *Ibid.*

6. *Injunction—Issuable Matters—Fraud—Deceit.*—Where a permanent injunction is the main relief sought in the action, and the pleadings and affidavits disclose serious controverted questions of fact, tending to show deceit and fraud by which the plaintiff would be deprived of his right, were the restraining order dissolved, it should be ordered continued to the hearing so that the facts may be properly ascertained by the jury and the law applied. *Proctor v. Fertilizer Works*, 153.

7. *Same—Irreparable Loss.*—Where the plaintiff, applying for injunctive relief as the main remedy sought in his action, has shown probable cause, or it is made to appear that he will be able to make out his case at the final hearing, or where the dissolution of the temporary restraining order would probably work him irreparable injury, it should be continued to the final hearing. *Ibid.*

8. *Same—Corporations—Bills and Notes—Banks and Banking—Certificates of Deposit.*—Where there is conflicting evidence, upon the hearing of an injunction, that a corporation has, by the fraudulent misrepresentations of its stock soliciting agent, obtained the note of the plaintiff, and the corporation has discounted it at a bank under agreement to let the money stay in the bank under a certificate of deposit;

INJUNCTION—*Continued.*

and in order to defeat the rights of the plaintiff the officers, without authority, have collusively transferred the certificate to a relative of the president, for the president's personal benefit, the defendant's claim as a *bona fide* holder for value raises a material issue of fact that the jury should determine upon the final hearing. *Ibid.*

9. *Same—Fraudulent Holder of Certificate of Deposit.*—Where there is evidence, upon the hearing for a permanent injunction, that the stock soliciting agent of a corporation had procured the plaintiff's note for the corporation by fraud, and it had discounted the note at a bank and held a certificate of deposit therefor; and in fraudulent collusion with the defendant had transferred to him the certificate of deposit for the personal benefit of the president of the corporation: *Held*, the fraudulent transaction as to the note being traceable to the certificate of deposit, the defendant may be restrained from collecting it from the bank. *Ibid.*

10. *Injunction—Equity—Elections.*—The courts of equity are slow to enjoin the holding of elections, and while they will not do so unless it is clear they are being illegally held, ordinarily the writ will issue to restrain the holding of an election where there is no authority for calling it and it will result in a waste of public funds. *Griffith v. Board of Education*, 408.

11. *Same — Remedy Unnecessary — Subject-matter.*—The appeal from an order dissolving a temporary injunction will be dismissed in the Supreme Court when it appears that an election against which this remedy has been sought, has not been held, and cannot be under the previous action of defendant board of education in calling it, and it appears there is presently nothing upon which it could operate. *Ibid.*

12. *Injunction — Mandatory Injunction—Equity.*—The characteristics between the granting of a preventive and mandatory injunction do not now predominate, each requiring the same exercise of caution by the courts as the other; and where the party seeking a mandatory injunction for the protection of easements and property rights has not slept on his rights, and the rights asserted are clear and their violation palpable, the writ will generally be issued without exclusive regard to the final determination of the merits, and the defendant, upon the plaintiff's success, compelled to undo what he has done. *Woolen Mills v. Land Co.*, 512.

13. *Same—Highways — Driveways — Easements—Final Hearing—Issues.*—There was evidence tending to show that defendant's land entirely surrounded the manufacturing plant of the plaintiff, except where it had access by a driveway to a public highway; and that the commissioners of the county having refused to construct the highway as the defendant desired, the defendant, through its agent, and in accordance with the agent's previously expressed threat, nevertheless so constructed the highway as to prevent plaintiff's ingress and egress to its plant by vehicles over its driveway; and with such rapidity as to prevent other relief than that by mandatory injunction which he seeks in his action: *Held*, upon the *prima facie* case so established, the plaintiff is entitled to the equitable relief sought, without regard to the final determination of the other facts in controversy as to plaintiff's ultimate rights. *Ibid.*

INJUNCTION—*Continued.*

14. *Injunction—Courts—Discretion—Appeal and Error—Continuance Pending Appeal—Statutes.*—Under our recent statutes, the Superior Court Judge, in his discretion, may decide adversely to the plaintiff's application for an injunction, and continue the restraining order pending appeal, on plaintiff's giving adequate security. *Swain v. Goodman*, 531.

15. *Injunction—Issues of Fact—Questions for Jury—Taxation—State Tax Commission.*—Where it is in controversy upon the pleadings and affidavits whether the State Tax Commission has allowed a decrease in the value of property of a large manufacturing company, and the corporation has sought a permanent injunction against the proper officers of the county from collecting this alleged excess, an issue of fact is raised for the determination of the jury, and it is error for the Superior Court judge to make permanent the temporary restraining order theretofore issued; but upon the record of this appeal a new trial is not ordered, it appearing that the injunction must be dissolved on another ground. *Mfg. Co. v. Comrs.*, 554.

IN PARI MATERIA. See Statutes, 5.

INSPECTION. See Contracts, 5; Employer and Employee, 15.

INSTRUCTIONS. See Arrest, 2; Appeal and Error, 3, 7, 14, 39, 43, 48, 50, 53, 54, 57, 58; Railroads, 3; Criminal Law, 16, 17, 21; Seduction, 3; Contracts, 3; Vendor and Purchaser, 3; Intoxicating Liquor, 1, 18, 21; Carriers, 3; Murder, 1; Trials, 6; Negligence, 6, 10, 13, 20; Courts, 5, 9; Contracts, 15, 26; Homicide, 1; Employer and Employee, 5, 7, 15, 16, 17; Evidence, 15, 23, 29; Fires, 1; Landlord and Tenant, 1; Limitation of Actions, 2.

1. *Instructions—Evidence—Questions for Jury—Trials—Deeds and Conveyances—Descriptions—Title.*—Where the plaintiff makes out a *prima facie* case of title by his chain of conveyances, and the defendant offers deeds and muniments tending to establish his superior or paramount title to the lands, and there is conflicting evidence as to whether the defendant's deeds cover the *locus in quo*, an instruction to the jury to find the issue for defendant if they believed the evidence is erroneous as invading the province of the jury to decide upon whether the defendant's deeds covered the subject of the litigation. *Jenkins v. Parker*, 125.

2. *Instructions—General Terms—Requests—Appeal and Error.*—Where the instructions of the trial judge in general terms correctly cover the evidence in the case, they will not be considered as erroneous as not being more specific in the absence of a proper special request for instructions thereon. *Duguid v. Rasberry*, 134.

3. *Instructions—Contracts—Defenses—Cancellation—Appeal and Error.*—Where there is conflicting evidence as to whether the contract sued on had been canceled by the parties, and the answer to this issue is controlling, it is not reversible error for the court to omit to state all the contentions of the parties or to charge as to the law on every possible phase of the evidence, unless in apt time so requested to do under the rules: *Held*, in this case a request of plaintiff to answer the issue "No" if the defendant had breached his contract on or before a certain date was properly refused. *Bowman v. Development Co.*, 249.

INSTRUCTIONS—*Continued.*

4. *Instructions—Presumptions—Appeal and Error.*—It will be presumed, on appeal, that the jury have given the charge of the court a fair and reasonable construction, and a charge upon any phase of the case must be examined with its own context, and that of the entire charge, so as to disclose its real meaning and import. *Sutton v. Melton*, 370.

5. *Instructions—Contracts—Breach—Damages—Burden of Proof.*—Where there is allegation and evidence of damage to the plaintiff's land and to his crop for the wrongful closing of his ingress and egress to and from his land by the defendant, the burden of proof as to the amount of compensatory damages is upon the plaintiff, though he may be entitled to recover nominal damages for a technical breach of contract, etc., and it is required of the trial judge to charge the law relating to the evidence in the case with clearness and certainty, so that the jury will not be confused or misled, either as to the measure of damages or the burden of proof. *Berry v. Lumber Co.*, 385.

6. *Instructions—Negligence—Carriers—Railroads—Personal Injury.*—The instructions as to the measure of damages to be awarded to an employee who received a personal injury caused by the negligence of his employer, a railroad company, are, in this case: *Held* correct under the ruling approved in *R. R. v. Tilghman*, 237 U. S., 499; *R. R. v. Earnest*, 229 U. S., 114. *Bass v. R. R.*, 445.

7. *Instructions—Appeal and Error.*—Where the plaintiff seeks to recover damages for an alleged negligent personal injury on a trial involving contributory negligence and proximate cause, the use of the words "contributory negligence" in defining proximate cause in the judge's charge, will not be held for reversible error, when from the other parts of the charge a jury of intelligent men must have clearly understood the principle upon which they were being instructed. *Gaither v. Clement*, 451.

8. *Instructions — Construed as a Whole — Appeal and Error — Proximate Cause—Contentions.*—Where the trial judge has correctly charged the jury as to the elements they should consider in the amount of damages recoverable for a personal injury, his failure to have specifically instructed them that such must be the immediate and necessary consequences of the injury is not reversible error, when from the statement of the contention of the parties and the other relevant parts of the charge the jury must have understood the principle of law applicable. *Ledford v. Lumber Co.*, 614.

9. *Instructions—Erroneous in Part.*—Where a part of a requested instruction consists of an abstract proposition of law inapplicable to the evidence, its refusal is not error, though it may have been correct in its other parts. *S. v. Kincaid*, 710.

10. *Instructions—Requests for Instructions.*—A correct prayer for instruction is not required to be given to the jury in its identical words, and no error is committed by the trial judge if the matter or principle embraced therein is correctly and amply presented. *Ibid.*

11. *Instructions—Contentions—Inadvertence.*—Where it is unmistakably plain that the court was stating the contentions of the party in his instructions, his mere inadvertence in referring to "the instructions of the court" will not be held for reversible error, either as an expression of opinion or a direction of the verdict. *Ibid.*

INSTRUCTIONS—*Continued.*

12. *Instructions—Evidence—Expression of Opinion—Statutes.*—Where there is evidence of conspiracy of the two defendants on trial for murder, with that of deceased's dying declaration, "Boys, you have killed me," a requested instruction that the declarations raised a doubt as to which one had struck the fatal blow, and that both defendants should be acquitted if the jury should be in doubt, is an expression of opinion upon the evidence, forbidden by the statute, especially when it has been admitted that a certain one of them had done so. *S. v. Brinkley*, 721.

13. *Instructions—Contentions—Appeal and Error—Harmless Error.*—The judge in his charge to the jury is not required to recite in detail all of the prolix testimony of the witnesses in stating the contentions of the parties, and his charge will not be held for error if he substantially submits them without unduly stressing those of one of them, and is not otherwise prejudicial to the appellant. *Ibid.*

14. *Instructions—Verdict Directing—Criminal Law—Appeal and Error—Prejudicial Error.*—Except in instances of admissions or evidence requiring explanation or reply of defendant, the burden of showing guilt beyond a reasonable doubt is upon the State, and it is reversible error for the judge to instruct the jury, against the presumption of defendant's innocence, that should they "believe the evidence," though all for the State, to find the defendant guilty of the offense charged. The language of the charge is again disapproved. *S. v. Singleton*, 738.

15. *Instructions—Courts—Expression of Opinion—Statutes.*—Where the jury has failed to that time to agree upon a verdict in a criminal action, an instruction by the judge that in effect it was a matter of indifference to him, but it was their duty to agree if they could do so without violence to their consciences; that they must find for conviction beyond a reasonable doubt, uninfluenced by prejudices, etc., *is held* not to be an expression of opinion by the judge upon the evidence, contrary to the statute. C. S., 564. *S. v. Pugh*, 800.

16. *Instructions—Correct as a Whole—Appeal and Error—Criminal Law—Reasonable Doubt.*—A part of a charge on a trial for a homicide is not erroneous upon the principle of a reasonable doubt when, if taken in connection with what follows, the charge correctly states the law. *S. v. Hall*, 807.

INSURANCE. See Damages, 1; Beneficial Associations, 1; Issues, 2.

1. *Insurance, Life—Days of Grace—Premium—Time of Payment—Forfeiture—Waiver.*—The time limited by a contract of life insurance for the payment of premiums to avoid a forfeiture is for the benefit of the insurer, which it may waive by its acts and conduct. *Paul v. Ins. Co.*, 159.

2. *Same—Evidence.*—The days of grace for payment of a life insurance premium were out on 3 August. On 27 July preceding, insurer wrote calling attention to the forfeiture, and offering to make helpful suggestions for payment. Insured's immediate reply offering premium note was received by insurer on 2 August, and on the same day it wrote enclosing its form note for a part of the premium and requesting a cash payment for the balance, evidently too late for a compliance by due course of mail by 3 August, which was received by the insured

INSURANCE—*Continued.*

on 6 August, and on the following day he signed and mailed the note and his check for the cash balance; 10 August the insurer wrote declining acceptance, and insisted on the forfeiture. On the day following the insured died of sudden illness, and the beneficiary instituted this action on the policy: *Held*, the evidence raised a reasonable inference of the defendant's waiver of the strict time limit for payment, and that the insured acted with reasonable promptness, sufficient for the determination of the jury, and an instruction directing a verdict for defendant constituted reversible error. *Ibid.*

INTENT. See Deeds and Conveyances, 1, 5, 17; Constitutional Law, 7; Parent and Child, 2; Statutes, 2; Negligence, 8; Contracts, 9, 23; Criminal Law, 7; Homicide, 3, 10.

INTEREST. See Contracts, 10; Executors and Administrators, 12; Roads and Highways, 3; Judgments, 5; Evidence, 23; Habeas Corpus, 3.

INTOXICATING LIQUORS. See Criminal Law, 8, 9, 10; Judgments, 11, 14.

1. *Intoxicating Liquor—Spirituous Liquor—Assisting in Manufacture—Instructions—Appeal and Error.*—In an action for the unlawful manufacture of spirituous and intoxicating liquor, an instruction of the court, considered in its entirety and with reference to the evidence, that put the burden on the State to prove defendant's guilt beyond a reasonable doubt, and in effect to find him guilty if he took part in the manufacture, though he had not alone produced the completed product, is not reversible error. *S. v. Baldwin*, 682.

2. *Intoxicating Liquor — Spirituous Liquor — Possession—Evidence—Presumption—Warrant—Search and Seizure.*—The defendant was seen entering with a suit-case into a house of another by the officers, and upon their following him, he endeavored unsuccessfully to escape by the back door, and when the suit-case was opened, it was found to contain eight quarts of liquor that smelled like brandy: *Held*, the seizure of the liquor under the circumstances did not require a search warrant. *S. v. Simmons*, 684.

3. *Same—Unlawful Transportation.*—Where the defendant has been arrested and eight quarts of spirituous liquor found in a suit-case he was carrying into the house of another, its possession is *prima facie* case of the unlawful purpose of sale, sufficient to convict him thereof; and, also, for unlawfully transporting the same. C. S., 3379. *Ibid.*

4. *Intoxicating Liquor—Spirituous Liquor—Seizure—Unlawful Possession Evidence.*—Where the *prima facie* case of unlawful sale of spirituous liquor arises from the possession, its capture by the officers is not illegal, and its being given to the jury for them to taste and smell, in corroboration of the other evidence, is not erroneous; and the liquor being the *corpus delicti*, such evidence would be competent had it been unlawfully seized, or in the illegal possession of the officers. *Ibid.*

5. *Intoxicating Liquor—Spirituous Liquor—Arrest—Warrant—State Statutes—Federal Statutes.*—A national prohibition officer, in making an arrest, is confined to the authority given him by the Federal statutes, and no additional power to make an arrest without a warrant can be conferred by our State statute, C. S., 4544, providing that a sheriff.

INTOXICATING LIQUORS—*Continued.*

etc., entrusted with the care and preservation of the peace, may arrest without warrant whenever they know, or have reasonable ground to believe, that a felony has been committed, etc. *S. v. Burnett*, 703.

6. *Same—Manufacture—Distillation—Misdemeanor—Acts in Presence of Officer—Criminal Law.*—The authority of a Federal prohibition officer to make an arrest is confined to the provisions of the National Prohibition Act, whereunder the unlawful distillation of spirits for the first offense is only a misdemeanor, and the authority to make arrest specifically referred to another Federal statute providing the same powers and protection, in making arrests, as that formerly conferred upon such officers for the enforcement of existing laws relating to the manufacture and sale of liquor under the laws of the United States, which permit an arrest without a warrant only when the person or persons charged are found by them in "the act of operating an illicit distillery." *Ibid.*

7. *Same -Felony.*—A national prohibition officer was not charged with the duty of enforcing the Federal Lever Act, with reference to the manufacture or sale of spirituous liquor, making the offense a felony, nor clothed with the powers incident to such enforcement, before it was repealed. *Ibid.*

8. *Same—Rules of Revenue Department—Courts Judicial Notice.*—The rules and regulations of the Internal Revenue Department, when approved by the Secretary of the Treasury, and not unreasonable or in conflict with the statutes appertaining to the subject, are considered binding, and may be taken note of by the court, and thereunder a national prohibition officer is unauthorized to arrest without a warrant the person charged with unlawful distillery when such person was not therein engaged at the time of the arrest. *Ibid.*

9. *Intoxicating Liquors—Spirituous Liquors — Arrest — Warrants—State Statutes—Federal Statutes—Courts—Jurisdiction.*—C. S., 4544, authorizing an arrest of the offender against the law applies only to peace officers of the State, and in the enforcement of the State law, and does not affect the conduct or powers of Federal officers unless the principles therein are extended to such officers by a Federal statute, when in the enforcement of a valid Federal law. *Ibid.*

10. *Same—United States Marshal—Federal Prohibition Officers.*—The effect and purpose of Revised Statutes U. S., sec. 788, are restricted to United States marshals and their deputies, and do not extend to national prohibition agents to arrest without warrants in the enforcement of the National Prohibition Act. *Ibid.*

11. *Same—Felonies—Arrest by Private Persons.*—A Federal prohibition officer, acting under the National Prohibition Act, can derive no further authority to arrest an offender without a warrant than the Federal statute itself provides; and no further power can be acquired by him by virtue of our State statute, C. S., 4543, permitting such to be done by a private person, in case of felony, such as murder, rape, and the like, when the unlawful act has been committed in his presence. *Ibid.*

12. *Intoxicating Liquor—Spirituous Liquor—Evidence—Nonsuit—Trials.*—Evidence upon the trial for the unlawful and willful manufacture of whiskey and for aiding, assisting and abetting parties in the said

INTOXICATING LIQUORS—*Continued.*

manufacture, that when the officers, upon information received, raided the still there were several participants there who ran away, unidentified, but one of them dodged and ran back across a ditch and into a pond, making tracks in the mud, apparently those of tennis shoes, and that later in the night the defendant was met by the officers in a road near his home with his clothes wet and wearing wet tennis shoes, and having a "testing vial" of the whiskey, etc., is sufficient to sustain a verdict of conviction. C. S., 3409. *S. v. Smith*, 725.

13. *Same.*—The rejection of evidence as to the quantity of cotton or corn the defendant, tried for the unlawful manufacture of liquor, etc., C. S., 3409, had raised on his farm that year, is of irrelevant testimony, and its exclusion not erroneous. *Ibid.*

14. *Intoxicating Liquor — Spirituous Liquor — Manufacture — Aiding and Abetting—Verdict—Judgment.*—The appellant, convicted on his trial of aiding or abetting in the manufacture of whiskey on one count of the indictment, C. S., 3409, may not complain because he was tried on another count of the same bill for the unlawful manufacture of liquor and acquitted, there being sufficient evidence to sustain a conviction on each one. *Ibid.*

15. *Intoxicating Liquor — Spirituous Liquor — Manufacture — Aiding and Abetting—Criminal Law—Punishment.*—The first conviction of manufacturing or aiding and abetting in the manufacture of spirituous, etc., liquors is a misdemeanor, and the second is a felony, C. S., 3409; and where the indictment does not charge a previous conviction it will be presumed that the defendant has not heretofore been convicted of the offense charged. C. S., 4617. *S. v. Clark*, 733.

16. *Intoxicating Liquor—Spirituous Liquor—Aiding and Abetting—Manufacturing.*—The defendant, guilty of aiding and abetting the unlawful manufacture of liquor, is equally guilty with those who actually operated the still. *Ibid.*

17. *Intoxicating Liquor—Spirituous Liquor—Manufacturing—Aiding and Abetting—Evidence—Verdict.*—While a verdict in a criminal action cannot rest upon mere suspicion, or conjecture, or speculation, and legal evidence of every material fact necessary to support the indictment is required, such evidence not held insufficient, as a matter of law, where the substance of the offense is proved, and the evidence on the whole is such as may lead reasonable minds, acting within the limitation prescribed by the rules of law to different conclusions. *Ibid.*

18. *Intoxicating Liquor—Spirituous Liquor—Indictment—Several Counts—Instruction—Burden of Proof.*—Where the defendant is on trial under two counts of an indictment, one for having whiskey in his possession for the purpose of sale, and the other that he had received more than one quart of it within fifteen consecutive days, evidence that he denied ownership of the whiskey, more than two quarts and less than one gallon, which was hidden in his barn, and found by the officer only after a careful search, with the other evidence of empty jugs in his home smelling of whiskey, *is held* sufficient to sustain a general verdict of guilty upon the open question of fact as to defendant's guilt, under a charge that the State was required to satisfy the jury thereof beyond a reasonable doubt. *S. v. Alston*, 735.

INTOXICATING LIQUORS—*Continued.*

19. *Same—General Verdict.*—Where the defendant is tried for the violation of the prohibition law under several counts in the indictment, a general verdict of guilty will be sustained, if the conviction was valid as to any one of them. *Ibid.*

20. *Intoxicating Liquor—Spirituous Liquor—Receipt of More Than One Quart—Evidence—Questions for Jury—Trials.*—Where a jug containing two quarts of whiskey was found by the officer making the arrest carefully hidden in the defendant's barn, the jury may infer, and find for their verdict, that he had received at one time more than one quart of intoxicating liquor, within the time prohibited by the statute. *Ibid.*

21. *Same — Instructions—Possession—Presumptions—Appeal and Error.*—Where there is evidence on the trial tending to show that the defendant had carefully concealed in his barn more than two quarts of whiskey, the ownership of which he denied, and an empty jug smelling of whiskey was found in his hands in his dwelling by the officer making the arrest, a charge of the court that places the burden of showing guilt of the defendant beyond a reasonable doubt upon the State, and emphasizes the position of the defendant that there is no presumption thereof from the possession of less than one gallon, but leaves it an open question for the jury, is not error. *Ibid.*

22. *Intoxicating Liquor — Spirituous Liquor — Manufacture — Evidence—Character—Alibi.*—Evidence tending to show that upon raiding a whiskey still the officers of the law saw at a distance a small white man and a negro operating it, who fled at their approach, the white man about the size of the defendant, leaving his coat, in which was found a picture of a woman acknowledged by the defendant to be his wife, with certain letters from her and a Virginia lawyer in regard to an indictment: *Held*, competent for the solicitor to question the defendant on the stand as to his having abandoned his wife, and as to the indictment in Virginia, as tending to impeach his character and shake his denial of being at the still, and as to his attempt to prove an *alibi*. *S. v. Evans*, 758.

23. *Intoxicating Liquor—Spirituous Liquor—Unlawful Sales—Evidence—Open Questions for Jury—Possession—Prima Facie Case.*—Upon the trial of defendant for having the unlawful possession of liquor for the illegal purpose of sale, there was evidence that the defendant had one-half gallon thereof in his automobile at the time of his arrest thereat, in two one-quart flasks, and declared that one of them was for himself and the other for a person whom he would not name, and that a search of his house at a previous time did not result in finding liquor therein, but in finding a place where a still had been operated about 150 yards distant. There was also evidence that at the time of the arrest the defendant declared it was not the first time he had had liquor, and that it would not be the last, and threatened injury to any one who had informed on him: *Held*, no *prima facie* case had been made out under the statute, but that all the evidence, when properly considered, was sufficient for an inference that he had the liquor, one quart at least, for the purpose of an illegal sale, upon which the jury could render a verdict of guilty, as upon an open question of fact. *S. v. Sheffield*, 783.

INTOXICATING LIQUORS—*Continued.*

24. *Intoxicating Liquor—Spirituous Liquor—Unlawful Sales—Acting for Another.*—One who participates in effecting the sale of liquor from one person to another is equally guilty of the unlawful sale thereof as the one for whom he was acting. *Ibid.*

25. *Intoxicating Liquor—Spirituous Liquor—Evidence—Verdict—Motions—Nonsuit—Trials.*—*Held*, the evidence in this case of the close relation and conduct of the two defendants indicted for violating the prohibition law, the location of the still on the land of B. and with pathway to his house, his furnishing the wood for the still, found by the officers fired and surrounded with material for the distillation of liquor, and the acts and conduct of S. in relationship to the unlawful act, is upon defendants' motion to nonsuit, sufficient to sustain a verdict of conviction against B. of "guilty of permitting a distillery to be erected on his premises and manufacturing liquor," and against S., of "guilty of manufacturing liquor." *S. v. Brown*, 789.

INTOXICATION. See Evidence, 25; Automobiles, 6; Homicide, 19, 20.

ISSUES. See Appeal and Error, 1, 4, 27; Instructions, 1, 3, 4, 6, 13, 15; Executors and Administrators, 9; Sheriffs, 5; Constitutional Law, 12; Trespass, 2; Trials, 3.

1. *Issues—Appeal and Error.*—Issues are sufficient which present every phase of the questions in controversy. *Powell v. Lumber Co.*, 168 N. C., 632, cited and applied. *Lane v. Engineering Co.*, 307.

2. *Issues—Pleadings—Insurance—Good Health.*—Where it is alleged in defense to an action to recover of a fraternal order the amount due the beneficiary as a funeral benefit, that at the time of the enrollment of the deceased his health was bad as to certain particulars, which avoided the policy, it is not error for the trial judge to confine the inquiry to the particulars alleged in the answer, and refuse to submit one tendered by the defendant as to the general sound bodily health of the deceased at that time. *Evans v. Junior Order*, 359.

JUDGES. See Constitutional Law, 4; Trials, 3; Appeal and Error, 26, 54.

JUDGMENTS. See Appeal and Error, 4, 10, 26, 59, 60; Deeds and Conveyances, 11; Trusts, 4; Estates, 9; Husband and Wife, 4; Injunction, 4; Carriers, 15; Contracts, 13; Partition, 2; Criminal Law, 8; Pleadings, 5; Attachment, 4; Covenants, 3; Courts, 18; Intoxicating Liquor, 14; Sheriffs, 5.

1. *Judgments — Statutes — Carriers of Goods—Railroads—Actions—Consignor and Consignee—Director General—Parties.*—Where the consignor brings action against the consignee for the purchase price of a shipment by common carrier, while the railroad was under control of the Federal Director, and the defense is that it had not been delivered, it was proper to make the Director General a party to the action; and in case the shipment had been lost through the carrier's default, a judgment against the carrier is the proper one. C. S., 602. *Mfg. Co. v. Tucker*, 303.

2. *Judgment—Demurrer—Pleadings—Estoppel.*—A judgment for defendant upon his general demurrer to the pleadings, not appealed from, is an estoppel as to the cause of action set up in the pleadings, and as effective as if the issuable matters arising from the pleadings had been established by verdict. *Swain v. Goodman*, 531.

JUDGMENTS—*Continued.*

3. *Same—Mortgages—Sales—Purchase by Mortgagee—Parol Promise—Statute of Frauds.—Semble,* a judgment in a former action brought for the alleged unlawful acquisition of the mortgaged premises by the mortgagee, under the power of sale, estops the mortgagor in his subsequent action upon an alleged promise of the mortgagee to sell so much of the lands as necessary to satisfy the mortgage and reconvey the remaining part to the mortgagor: *Held,* the former judgment is an estoppel of all matters therein issuable, and a parol agreement to thus satisfy the mortgage debt is void within the intent and meaning of the statute of frauds. *Ibid.*

4. *Judgments—Motion to Set Aside—Proof—Attachment—Principal and Surety.*—Where an attachment bond has been given and acted upon in an action for debt, and judgment by default final has been entered against the principal and his surety, the surety proceeding alone to set aside the judgment must show, by his evidence or in some recognized way outside of the averments of his own unsworn statement, the ground upon which he relies, or his motion will be denied. *Thompson v. Dillingham,* 566.

5. *Judgments—Interest of Court—Voidable Judgments—Waiver—Clerks of Court—Principal and Surety—Surety's Motion to Set Aside.*—A judgment by default final entered by the clerk of the court is not void because of interest, but voidable only, not being in violation of a statute bearing directly on the question, and objection on that ground may be waived by the parties; and while the judgment stands unassailed and unexcepted to by the principal defendants, or by any other directly representing them, it is not open for a surety on an attachment bond given in the case to maintain an objection for his own benefit, and he must conform to his obligation according to its tenor. *Connelly v. White,* 105 N. C., 65, cited and distinguished. *Ibid.*

6. *Judgments—Arrest of Judgment—Criminal Law—Homicide—Verdict—Appeal and Error.*—Where there is evidence tending to show that on the trial for homicide the two defendants acted together, as a part of a common purpose, in killing a sheriff and one of his posse in making an arrest, an instruction that if one of them should be found guilty of manslaughter, the other should be acquitted, is erroneous; and where the judge upon the mistaken application of this principle, arrests the judgment as to one upon a verdict of guilty as to both, the case will be remanded on appeal that a judgment against both may be entered upon the verdict. *S. v. Hall,* 808.

7. *Judgment—Arrest of Judgment—Verdict—Appeal and Error—Procedure.*—Where, after verdict in a criminal action, the trial judge has erroneously arrested the judgment and discharged the defendant, on appeal the judgment in arrest will be set aside and a writ will be ordered to issue from the Superior Court that the defendant be brought before the next term thereof for sentence upon the verdict. The procedure as to the defendant's rearrest and right of bail is given in such cases. *Ibid.*

8. *Judgments, Suspended—Sentence—Criminal Law—Inquiry—Courts—Jurisdiction.*—It is within the power of the court having jurisdiction of a criminal action to suspend judgment on verdicts of conviction for

JUDGMENTS—*Continued.*

determinate periods and for a reasonable length of time, conditioned on good behavior, and the court so acting may in its sound discretion conclusively determine from time to time whether the conditions have been violated, except where the instance being inquired into has been determined for the defendant by the jury, or other competent tribunal having jurisdiction of the criminal offense which is the sole basis of the present inquiry, in which event the result of the former action will be controlling. *S. v. Hardin*, 815.

9. *Judgments, Suspended—"Good Behavior"—Criminal Law.*—Where the court, within the proper exercise of its authority, has suspended judgment upon conviction of the defendant in a criminal action, the term "good behavior" signifies that his conduct will be such as the law authorizes, in contradistinction to bad behavior punishable by the law. *Ibid.*

10. *Judgments, Suspended — Investigation — Findings.*—In order for the court having jurisdiction to impose a valid sentence upon a suspended judgment in a criminal action, it must be properly established by pertinent testimony that the conditions upon which the judgment had been suspended had been broken by the defendant. *Ibid.*

11. *Same—Ultimate Facts—Intoxicating Liquors—Spirituous Liquors—Statutes.*—Findings of the trial judge, in imposing a sentence on the defendant under a suspended judgment, that the defendant had manufactured and had in his possession 150 gallons of wine, and had bought grapes therefor in another county, and persons had been seen coming from his place intoxicated, are insufficient for the imposition of the sentence, the manufacture of wine from grapes not being prohibited by the State law (C. S., 3367), and the mere possession, unless for the purposes of sale, being lawful. Nor is it *prima facie* evidence of guilt if the wine had been manufactured from grapes grown on the owner's premises. C. S., 3379. *Ibid.*

12. *Same—Inferences.*—The findings of the trial judge on imposing a sentence under a suspended judgment in a criminal action are insufficient where they only permit the inference of a breach of the condition, and do not find the ultimate fact of guilt in infringing the criminal laws of the State. *Ibid.*

13. *Judgments, Suspended — Investigation—Courts—Jurisdiction—Inferior Courts.*—The judge of the Superior Court having jurisdiction is not concluded in determining whether the defendant has broken the condition annexed to a suspended judgment, and passing sentence thereunder, by a judgment of a recorder's court not having jurisdiction, acquitting the defendant of the offense under investigation. *Ibid.*

14. *Judgments, Suspended—Sentence—Federal Law—Findings—Inferences—Intoxicating Liquor—Spirituous Liquors.*—The XVIII Amendment to the Constitution of the United States, and Volstead Act designed to make it effective, does not condemn or make unlawful the manufacture of liquor for certain specified purposes, or under certain conditions, and a finding of the judge of the Superior Court that the defendant, under a suspended judgment, had manufactured large quantities of wine, is not sufficient upon which he may pass the sentence, upon condition broken, the ultimate fact of guilt not having

JUDGMENTS—*Continued.*

been found by him. *S. v. Yates, ante*, 753, concerning the exercise of the pardoning power vested by our Constitution in the Governor, cited and distinguished. *Ibid.*

15. *Same—Courts—Jurisdiction.*—The State courts have no jurisdiction over offenses arising exclusively under the XVIII Amendment to the Constitution of the United States and the Volstead Act passed for its enforcement; and where the State court has suspended judgment against the defendant conditioned on his good behavior, this without more should be considered only in connection with the State statutes on the subject of prohibition, that our courts have jurisdiction alone to enforce, and not with reference to the Federal law on the subject. *Ibid.*

16. *Judgments, Suspended — Sentence — Collateral Agreement—Attorneys' Fees—Double Punishment.*—A sentence imposed under a suspended judgment in a criminal action upon condition of good behavior broken, is not objectionable as double punishment for the same offense, by reason of the fact that the defendant had performed his agreement to reimburse the private prosecutors for money they paid in attorneys' fees in the action. *Ibid.*

JUDGMENTS, SUSPENDED. See Judgments.

JUDICIAL NOTICE. See Courts, 1; Payment, 1; Intoxicating Liquor, 8.

JUDICIAL SALES. See Trusts, 2; Deeds and Conveyances, 16.

JURISDICTION. See Eminent Domain, 3, 11, 14, 16; Habeas Corpus, 5; Courts, 2, 3, 9; Railroads, 5; Removal of Causes, 2, 3; Landlord and Tenant, 2; Contempt, 4; Guardian and Ward, 1; Constitutional Law, 18; Actions, 7; Intoxicating Liquors, 9; Judgments, 8, 13, 15.

JURORS. See Jury.

JURY. See Appeal and Error, 27, 57; Courts, 9; Homicide, 17; Removal of Causes, 5.

1. *Jurors—Qualification—Courts—Findings of Fact—Appeal and Error—Rape.*—Where defendant, tried for rape, excepted to the refusal of the judge to set aside the verdict of guilty because one of the jurors had expressed an opinion of the defendant's guilt, the finding of the trial judge as a fact that he had taken part in arguments, in his presence, on the subject of capital punishment, but had not expressed or formed any opinion as to defendant's guilt, but had only said that if the defendant were guilty he should be hung; and that the juror was qualified to hear the evidence and reach his conclusion thereon fairly and impartially, sustains his action on appeal in refusing the defendant's motion. *S. v. Montgomery*, 748.

2. *Same—Court's Discretion.*—*Held*, on this appeal, the question of the qualification of a jury to sit upon the trial would have been a matter largely resting in the sound discretion of the trial judge, on appellant's motion to set aside the verdict for the juror's former expression of bias against him, had the judge found the facts somewhat differently upon the question of the juror's impartiality. *Ibid.*

JURY—*Continued.*

3. *Juror — Opinion — Impartial Trial — Courts — Discretion—Appeal and Error.*—Where on the trial of a criminal case jurors on their *voir dire* have stated they had formed an opinion of the defendant's guilt, but they could lay this aside, hear the evidence, the argument of counsel and the charge of the court, and render a fair and impartial verdict according to the evidence, their serving on the jury is a matter within the discretion of the trial judge, and not reviewable on appeal. *S. v. Winder*, 776.

JUSTICES OF THE PEACE. See Public Officers, 1; Courts, 2, 6; Landlord and Tenant, 2; Deeds and Conveyances, 8.

JUSTIFIABLE HOMICIDE. See Homicide, 6, 15.

JUSTIFICATION. See Arrest, 2.

JUVENILE COURTS. See Appeal and Error, 6.

LACHES. See Appeal and Error, 46.

LANDLORD AND TENANT. See Courts, 2; Criminal Law, 1.

1. *Landlord and Tenant—Possession by Tenant—Ejectment—Title.*—The tenant continuing in possession of the premises under a lease from the landlord may not deny the latter's title, without first surrendering the possession, by setting up a superior outstanding title in himself, or in some third person; and the principle upon which the tenant may dispute the derivative title of one claiming under the landlord, does not arise upon this appeal. *Hobby v. Freeman*, 240.

2. *Same—Justices of the Peace—Jurisdiction—Exceptions—Appeal and Error—Objections and Exceptions.*—Where the original jurisdiction of a justice of the peace, in a possessory action of ejectment, has not been excepted to in the tenant's appeal, the question of title is not raised for adjudication in the Superior Court, or properly presented on the tenant's appeal to the Supreme Court. *Ibid.*

3. *Landlord and Tenant—Leases—Acceptance of Rent—Forfeiture—Election of Remedies—Waiver.*—The application of the principle upon which the landlord, by accepting the rent after the lessee's forfeiture of his rights under the terms of his lease, is a waiver of his right to terminate the lease, is upon the theory that the landlord has been put to a voluntary election between two opposing courses, and not when the lessee remains in possession of the leased premises by giving the bond for possession, in a summary action of ejectment. *Winder v. Martin*, 410.

4. *Same.*—Where the breach of the tenant of his contract of lease amounts to a forfeiture, and his landlord voluntarily accepts the rent accruing thereafter, his thus voluntarily accepting the rent will prevent him at a later time from insisting upon the forfeiture under the circumstances that would otherwise have avoided the lease. *Ibid.*

5. *Landlord and Tenant—Leases—Contracts—Covenant—Breach—Verdict—Abandonment of Contract.*—Where the plaintiff, a lessee of defendant's barber shop, equipment, etc., alleges a breach of contract by the defendant in failing to perform a covenant to furnish sufficient hot water for the purposes of his business, a verdict by the jury

LANDLORD AND TENANT—*Continued.*

that defendant had breached his contract does not alone, or in the absence of a stipulation in the lease to that effect, justify the plaintiff in abandoning the leased premises during the period of the lease, and recover full damages caused by the defendant's breach. *Brewington v. Loughran*, 558.

6. *Same—Notice to Landlord.*—The lessee of a barber shop is not justified in abandoning the leased premises or in suing for full damages for the alleged breach of the lessor's contract in failing to supply a sufficiency of hot water for his customers, unless otherwise stipulated in the contract, without putting the lessor in default by affording him a reasonable opportunity, after notice, to comply with the terms of his agreement. Instances in which the breach of a covenant of lease would make it impossible or impracticable for the tenant to remain, distinguished. *Ibid.*

7. *Landlord and Tenant—Leases—Contracts—Damages—Trades—Breach —Profits Prevented—Speculative Damages.*—The lessee of a barber shop brought action against his lessor to recover damages, alleging the latter's breach of covenant in failing to supply a sufficiency of hot water for his customers: *Held*, the probable losses to his business on that account were too speculative or remote to be recoverable, and an instruction that the jury may consider this element of damages in their verdict constitutes reversible error. *Ibid.*

8. *Landlord and Tenant—Leases—Breach of Covenant—Damages—Value of Lease.*—Where the lessor's breach of his covenants of lease amounts to an abandonment, justifying the lessor's action for full damages, the rule applicable is that the amount recoverable must be such as would naturally or reasonably follow from the lessor's breach, and were reasonably within the minds of the parties at the time the lease was executed; and where the gist of the action is the deprivation, in whole or in part, of the benefits of the lease, in the absence of any special circumstances brought home to the knowledge of the lessor, generally the tenant is entitled, as the measure of his damages, to the difference between the rental value of the premises for the term, in the condition as contracted to be, and the value in their actual condition, having regard in proper instances for the particular use for which the tenant contracted. *Ibid.*

9. *Landlord and Tenant—Lease—Breach of Covenant—Damages—Duty of Lessee—Instructions.*—While the lessee may recover such special or general damages, upon the breach by the lessor of his covenants of lease, when specifically set forth and proven, as are directly and necessarily occasioned by the lessor's wrongful act or default, and which were reasonably within the minds of the parties at the time of making the contract of lease, it is incumbent on the lessee, by the exercise of reasonable effort and care, to prevent such damages, and to the extent that he could reasonably have done so, he will not be permitted to recover; and where the evidence in the lessee's action for damages presents these principles, a charge, in general terms, that the plaintiff was entitled to a reasonable compensation, subject to the duty the law imposed upon him to mitigate the loss, is too indefinite, and constitutes reversible error. *Ibid.*

LAND. See Contracts, 1; Dower, 1; Game, 8; Deeds and Conveyances, 6; Removal of Causes, 4; Courts, 4.

LAPPAGE. See Boundaries, 3.

LAPSE. See Wills, 5.

LARCENY. See Criminal Law, 13, 20; Receiving Stolen Goods, 1.

1. *Larceny—Indictment—Proof—Variance.*—The charge in the indictment was for the larceny of a diamond. The proof that it was a large diamond set in the center of a brooch surrounded by pearls and small diamonds, is not a fatal variation between the charge and proof. *S. v. Hauser*, 769.

2. *Same—Husband and Wife—Constitutional Law.*—Where the indictment charges larceny of a diamond as from the husband, when it was in fact the property of his wife, and they were living together as husband and wife, and he had charge of her affairs and of the property in the house, he has such special property in the article solen as will sustain a conviction, notwithstanding the Constitution recognizes the wife's right in her individual property. *Ibid.*

LEASES. See Cities and Towns, 6, 7; Courts, 1; Game, 8; Landlord and Tenant, 3, 5, 7, 8, 9.

1. *Leases—Contracts—Abandonment.*—In the absence of provisions in the lease, the degree of dereliction or default on the part of the landlord that will justify the tenant in abandoning the leased premises and absolve him from paying the rent, and justify him in suing for full damages, is a question that must be determined by the facts and circumstances of each case; but the ordinary rule applicable is that a contract is considered to remain in force until it is rescinded by mutual consent, or until the opposite party does some act inconsistent with the obligations imposed on him by the contract, that amounts to an abandonment of it on his part. *Brewington v. Loughran*, 559.

LEGISLATION. See Roads and Highways, 1; Statutes; Taxation, 1.

LEGISLATIVE POWERS. See Contempt, 3.

LESSOR AND LESSEE. See Cities and Towns, 7.

LETTERS. See Game, 7; Evidence, 14.

LEVY. See Attachments, 3.

LEX FORI. See Pleadings, 1.

LIABILITY. See Cities and Towns, 6; Carriers, 9.

LIBEL. See Evidence, 14.

1. *Libel—Slander—Actionable Per Se—Damages.*—Everything printed or written which reflects on the character of another and is published without lawful justification or excuse, is a libel, whatever the intention of the writer may have been, and many charges which if merely spoken of another would not be actionable without proof of special damages may be libelous *per se* when written or printed and published, although such charges may not impute the commission of a crime. *Hedgepeth v. Coleman*, 309.

LIBEL—*Continued.*

2. *Libel—Communication—Third Persons—Actions—Damages—Causal Connection.*—While the defamatory words of a libelous letter must be communicated to another than the one to whom the defamatory words were written, to be actionable, it is sufficient if the defendant had communicated them to only one other person, or if, under the circumstances and the existing conditions, the defendant must have intended, or had reason to suppose, that the person addressed would do so, and the damage complained of was occasioned by the act, in the relation of effect and cause. *Ibid.*

3. *Same—Minors—Duress.*—Where a libelous letter is addressed to a boy of between fourteen and fifteen years of age, it may operate so powerfully upon his immature mind as to amount to a coercion, and his communicating it to his near relation under such circumstances need not be conclusively considered as his voluntary act. *Ibid.*

4. *Same—Parent and Child—Questions for Jury—Trials.*—In an action for libel, where the evidence tends to show that the defendant was responsible for a libelous letter to a boy between fourteen and fifteen years of age, charging him, without legal excuse, of larceny, and threatening prosecution and imprisonment if he did not return the stolen goods, and had good reason to believe that the boy would naturally show the letter to others through fear or for counsel and advice, it raised a question for the jury to determine whether the defendant must have foreseen the exposure of the letter as the natural and probable result of the libel. *Ibid.*

LICENSES. See Evidence, 19.

LIENS. See Cities and Towns, 7, 8; Attachment, 2.

1. *Liens—Artisans—Common Law—Statutes—Police Powers.*—C. S., 2435, is within the police power of the State and in addition to the common-law lien given artisans on personal property repaired by them, while in their possession, for the reasonable value of the repairs, provides for its enforcement by foreclosure in accordance with its stated terms. *Johnson v. Yates*, 24.

2. *Same—Vendor and Purchaser—Contracts—Mortgages—Priorities.*—C. S., 2435, giving to artisans a lien for the reasonable value of their work done on personal property while retained in their possession, with a prescribed method of foreclosure for the enforcement of the lien, enters into every contract of sale of personal property, whether by chattel mortgage to secure the balance of the purchase price or other, made between the vendor and purchaser, and when enforceable, is superior to the vendor's lien or that created by the mortgage. *Ibid.*

3. *Same—Legal Possession—Rights Implied.*—The requirement of C. S., 2435, that the lien in favor of the artisan making repairs on personal property shall attach under the provisions of the statute, only where made at the instance of the owner "or the legal possessor of the property," includes within its terms all persons whose authorized possession is of such character as to make reasonable repairs necessary to the proper use of the property, and which were evidently in the contemplation of the parties. *Ibid.*

LIENS—*Continued.*

4. *Same—Automobiles.*—Where the vendor of an automobile takes a purchase-money mortgage and transfers the possession to the vendee for an indefinite period, it is with the implied authority in the vendee that he may use the machine and keep it in such reasonable and just repair as the use will require; and where, at his instance, a mechanic has repaired the same, his reasonable charge for such repairs creates a lien on the automobile, retained in his possession, superior to that of the vendor's mortgage. *Ibid.*

5. *Liens—Agricultural Liens — Priorities — Mortgages—Deeds in Trust.*—An agricultural lien, given by C. S., 2480, for the purpose of enabling the cultivation of the soil to raise a crop, is preferred by the statute to all others, except those given the landlord or laborer under C. S., 2481, when it is in proper form and duly registered; and it is preferred to liens of other kinds existing by mortgage or deed in trust on the same crop, to the extent of the amount advanced thereunder. *Williams v. Davis*, 90.

LIFE ESTATES. See Estates; Parent and Child, 3; Wills, 6.

LIMITATIONS. See Municipal Corporations, 3.

LIMITATION OF ACTIONS. See Executors and Administrators, 3, 10; Actions, 5; Pleadings, 2; Railroads, 6, 7; Actions, 4; Boundaries, 1, 3; Deeds and Conveyances, 7; Covenants, 5.

1. *Limitation of Actions — Title — Adverse Possession — Color — Public Squares — Dedication—Acceptance—Statutes.*—Where the owner of lands has platted them into streets and a public square, and sold them to various purchasers with reference thereto, who have made improvements on the lots so purchased, and there is evidence that the sale was made in anticipation of the location of a town which was soon thereafter built, and that it had accepted the dedication of the streets and public square so platted; and that the original owner subsequently had conveyed this open square to a railroad company which had continuously used it more than seven years for the purposes of a depot: *Held*, upon the question of the title of the railroad claimed by adverse possession under the color of its deed, it is reversible error for the judge to charge the jury that should the railroad company, the plaintiff in the action, have held adverse possession under known and visible lines and boundaries, under color, it would ripen its title, such being contrary to the provisions of Laws 1891, ch. 224 (C. S., 435). *R. R. v. Dunn*, 427.

2. *Same—Instructions—Appeal and Error.*—An erroneous charge that the title to an open square, dedicated to and accepted by a town, would be acquired by seven years adverse possession under known and visible lines and boundaries, contrary to the provisions of our statute, C. S., 435, is not cured alone by a full and complete charge on the principles of an offer to dedicate and an acceptance of the square by the town. *Ibid.*

3. *Limitation of Actions—Adverse Possession—Husband and Wife.*—Where the husband owns or has title to the *locus in quo*, his living thereon with his wife is his sole possession in regard to the question of title ripened by adverse possession, and the principle upon which it

LIMITATION OF ACTIONS—*Continued.*

is regarded as that of his wife when she owned the title and he claims under a void deed from her, as decided in *Kornegay v. Price*, 178 N. C., 441, does not apply. *Rutledge v. Mfg. Co.*, 430.

4. *Limitation of Actions—Contracts—Breach—Master and Servant—Employer and Employee.*—Where an employee, injured while engaged in his duty to his employer, has compromised his claim for damages by going back to work in a crippled condition under an agreement that he should receive a living wage for life sufficient for the support of himself and family, and upon breach of the employer of this agreement, has been forced to seek employment elsewhere, the fact that he has done so, under the circumstances, will not avoid his recovery in his action upon the compromise agreement, and the statute of limitations will begin to run only from the time of the defendant's breach of the contract. *Fisher v. Lumber Co.*, 486.

5. *Limitation of Actions—Pleadings—Burden of Proof.*—Where the three-year statute of limitation is pleaded in defense to an action for wrongful conversion of personal property, the burden of proof is on the plaintiff to show that the action was brought within the time allowed from the accrual of the cause, or that otherwise it was not barred. *Rankin v. Oates*, 517.

6. *Same—Statutes—New Action—Costs—Condition Precedent.*—The one-year period extended for the bringing of another action after nonsuit upon the same subject-matter, C. S., 415, is applicable only when the costs in the original action have been paid by the plaintiff before commencement of the new suit, unless the original suit was brought *in forma pauperis;* and where the appropriate statute has been pleaded and its time expired both before the bringing of the new action and the payment of the cost in the original one, the second action is barred though commenced within the one-year period, when the original case has not been brought *in forma pauperis. Bradshaw v. Bank*, 172 N. C., 632, cited and distinguished. *Ibid.*

LOCAL LAWS. See Constitutional Law, 8, 19; Easements, 2.

LOCATION. See School Districts, 15.

MALICE. See Homicide, 11, 16.

MANDATORY INJUNCTION. See Appeal and Error, 20; Injunction, 12.

MANUFACTURE. See Intoxicating Liquors, 1, 6, 14, 15, 16, 17, 22.

MANSLAUGHTER. See Automobiles, 5; Homicide, 7, 10.

MARRIAGE. See Wills, 1; Husband and Wife, 8, 9.

1. *Marriage—Domestic Relations—Contracts—Debts—Constitutional Law—Exemptions—Debtor and Creditor.*—The marriage relation, spoken of as a civil contract, is more than an ordinary business contract in that the marriage confers certain other privileges and imposes certain other duties upon the parties as between themselves and in their relation to society, among them being the husband's duty to protect and provide for his wife; and this is more than a debt, in its ordinary sense, and not merely such an one as exists in the ordinary accepta-

MARRIAGE—*Continued.*

tion of the word, or within the contemplation of our Constitution, Art. X, secs. 1 and 2, allowing to the creditor his homestead or personal property exemptions therefrom. *Anderson v. Anderson,* 140.

2. *Same—Trusts.—Held,* under the facts and circumstances of these proceedings of the wife, under the provisions of C. S., 1667, for a reasonable support, etc., an order was proper that the husband convey certain of his lands in trust to secure the allowance made to the wife, or in default thereof, the lands should so be held by the trustee designated. *Ibid.*

MASTER AND SERVANT. See Employer and Employee, 1, 3, 6, 8, 10, 13, 16, 17; Railroads, 7; Negligence, 4, 15; Carriers, 17; Compromise and Settlement, 2; Contracts, 21; Fires, 1; Limitation of Actions, 4.

MEASURE OF DAMAGES. See Damages, 2.

MENTAL CAPACITY. See Injunction, 5.

MINORS. See Employer and Employee, 5; Libel, 3.

MISDEMEANORS. See Municipal Corporations, 3; Intoxicating Liquors, 6; Criminal Law, 9.

MISREPRESENTATIONS. See Carriers, 5.

MISTAKE. See Carriers, 5.

MONEY. See Carriers, 7.

MORTGAGES. See Injunction, 1; Liens, 2, 4; Trusts, 2, 5; Judgments, 3; Deeds and Conveyances, 14, 16.

1. *Mortgages — Title — Cancellation—Bills and Notes—Assignment—Statutes.*—Where a note, secured by a mortgage, is assigned and pledged as collateral by the mortgagee to his own note, without an assignment of the mortgage conveying title for the purpose of the security, but which was only left with the payee of his note, the legal title to the lands remains in the mortgagee, who alone is authorized to cancel the mortgage. C. S., 2594 (1). *Bank v. Sauls,* 165.

2. *Same—Registration—Notice.*—Where the lender of money accepts as collateral a note secured by mortgage, in order to protect himself he must have the legal title transferred and assigned to him by a proper conveyance for the purpose, and have it registered as notice against subsequent conveyances for value, etc.; otherwise, the assignment of the note can operate on the note alone. *Ibid.*

3. *Same—Mortgagees—Cancellation in Person—Exhibit of Instruments—Satisfaction.*—Only the mortgagee is entitled to have his mortgage canceled on the book in the office of the register of deeds, either in person, C. S., 2594 (1), or by the register of deeds upon the exhibition of the mortgage and note properly endorsed by him, C. S., 2594, subsecs. 2 and 3; and when the mortgagee cancels the instrument in person, under subsec. 1, it is a complete release and discharge of the mortgage, subsec. 4, for in such case the statute does not require the exhibition of the mortgage and the note it secures. *Ibid.*

MORTGAGES—*Continued.*

4. *Same—Collateral.*—The legal title to mortgaged lands is conveyed by the instrument to the mortgagee, and remains in him until transferred or assigned, for the purpose of the security or the cancellation of the instrument, C. S., 2594; and where the mortgagor has afterwards conveyed the fee-simple title to another, and receives a mortgage back to secure a note for the balance of the purchase price of which the same mortgagee becomes the holder, his personal cancellation of the first mortgage, without producing it or the note it secures, is a complete discharge or release of the lien thereof, and where he borrows money after such cancellation, and hypothecates the note of the second mortgage as collateral to his own, the lender for the purposes of the security, acting in good faith, has a prior lien on the lands. *Ibid.*

5. *Mortgages—Deeds and Conveyances—Statutes—Connor Act.*—The Connor Act, requiring the registration of conveyances to give notice to subsequent purchasers, etc., includes mortgages within its terms. *Ibid.*

MOTIONS. See Intoxicating Liquors, 25.

MUNICIPAL CORPORATIONS. See Cities and Towns, 1, 6, 7, 8, 9; Constitutional Law, 8; Eminent Domain, 10, 13.

1. *Municipal Corporations—Cities and Towns—Government—Negligence—Damages.*—A municipality, acting within the exercise of a purely governmental function, including generally all those existent or imposed upon them by law for the public benefit, is not liable for the negligence of its agent or employee, unless a right of action therein is given by statute. *James v. Charlotte*, 630.

2. *Same—Statute—Collecting Garbage.*—A city is in the exercise of a governmental duty in collecting garbage from the residence of its inhabitants under an ordinance passed in accordance with the provisions of C. S., 2799, and is not liable in a civil action for damages to one injured by the negligence of its drivers of the carts or wagons when so engaged, there being no provision of law conferring such right. *Ibid.*

3. *Same—Speed Limits—Criminal Law—Misdemeanors.*—C. S., 2618, fixing a speed limit for motor vehicles, etc., and making its violation a misdemeanor, is a cumulative right of action given at common law for the recovery of damages for a personal injury caused by the negligent acts of another, and can confer no right of action to recover damages in such instances against a city, by reason of the violation of this statute by a driver of a motor cart or wagon in collecting garbage, etc., under an ordinance passed in pursuance of the provisions of C. S., 2799, the remedy, if any, being by indictment. *Ibid.*

4. *Same—Business for Profit.*—It is the primary duty of the owner or occupant of the premises to remove his garbage, etc., therefrom, under an ordinance passed in pursuance of C. S., 2799; and upon his failure thereof, the city may remove the same under certain requirements of the owner or occupants, with its own carts or wagons; and the fact that the city is permitted to charge the cost of such service does not change its act from a governmental function to a business for profit, or affect its nonliability for the negligent acts of its agents or employees therein. *Ibid.*

MURDER. See Homicide, 1, 2, 3, 4, 7, 8, 10, 11, 12, 14, 18, 19, 20, 21, 22, 23.

Murder — Homicide — Instructions — Evidence — Inferences—Appeal and Error.—Where, upon the trial of a homicide, there is evidence that the prisoner killed his wife with a knife, and the question is presented whether the deed had been done intentionally or by a misadventure or accident, the jury may convict upon finding that the killing with the knife was intentional, and an instruction that the jury may not infer the worst intent is properly refused. *S. v. Kincaid*, 710.

NECESSARIES. See Cities and Towns, 3; Constitutional Law, 17.

NECESSITY. See Cities and Towns, 2; Eminent Domain, 6; Easements, 2.

NEGLIGENCE. See Railroads, 1, 2; Carriers, 3, 7, 8, 9, 12, 13, 17; Statutes, 3; Appeal and Error, 15; Damages, 1; Evidence, 12, 25; Banks and Banking, 4; Contracts, 18; Employer and Employee, 3, 9, 13, 16, 17; Fires, 1; Instructions, 6; Automobiles, 1, 2, 5; Municipal Corporations, 1.

1. *Negligence—Evidence—Res Ipsa Loquitur—Prima Facie Case—Automobiles—Repairing—Gasoline.*—Where the servant of a repairer of an automobile for the owner undertakes in the course of his employment to clean the car with gasoline in an open container, while the batteries were exposed and likely to be started in operation and emit electrical sparks that would explode the gasoline or its vapors and wreck the car, and an explosion consequently results, in the owner's action for damages against the proprietor of the garage the circumstances make out a *prima facie* case of negligence. *Modlin v. Simmons*, 63.

2. *Negligence—Evidence—Res Ipsa Loquitur—Burden of Proof.*—Where a *prima facie* case of negligence, under the doctrine of *res ipsa loquitur*, has been established in an action to recover damages, the burden of proof remains on the plaintiff throughout the trial, the question for the jury to determine being whether thereunder upon the whole evidence the plaintiff has established the negligence alleged as a fact, the *prima facie* case otherwise being sufficient to sustain an affirmative finding. *Ibid.*

3. *Negligence—Evidence—Res Ipsa Loquitur.*—Ordinarily in an action by the plaintiff to recover damages for a personal injury alleged to have been caused him by the defendant's negligence, he must prove circumstances tending to show some negligent fault of omission or commission in relation to a duty owed to him by the defendant, in addition to the happening of the physical accident; and where the doctrine of *res ipsa loquitur* applies, it is distinctive in permitting negligence to be inferred by the jury from the physical cause of an accident, without the aid of circumstances as to the responsible human cause. *Harris v. Mangum*, 235.

4. *Same—Master and Servant—Employer and Employee—Steam Boilers.* The application of the doctrine of *res ipsa loquitur* does not depend upon the relationship of the parties to each other, such as, in this case, employer and employee, but in the inherent nature and character of the act causing the injury, as where the thing causing the injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care; and under such circumstances a bursting of a boiler, in the absence of explanation, is evidence of negligence to be considered by the jury. *Ibid.*

NEGLIGENCE—*Continued.*

5. *Same—Burden of Proof—Questions for Jury—Trials.*—The *prima facie* case of negligence established by the proper application of the doctrine of *res ipsa loquitur*, in a given case, is only evidence for the consideration of the jury, and the defendant may elect whether he will or will not introduce evidence in explanation, or in rebuttal of the plaintiff's case. *Ibid.*

6. *Same — Instructions — Appeal and Error—Prejudicial Error.*—Where there is evidence that the plaintiff, defendant's employee, was injured by the explosion of a boiler under circumstances permitting the application of the doctrine of *res ipsa loquitur*, an instruction that the law raised a presumption of the defendant's negligence that shifted to it the burden of showing that the explosion was not negligently caused, is prejudicial error, in imposing upon it the burden of disproving negligence, contrary to the rule that the burden remains on the plaintiff throughout the trial to prove by the preponderance of the evidence that the defendant's negligence was the proximate cause of the injury alleged. *Ibid.*

7. *Negligence—Evidence—Questions for Jury—Fires.*—The defendant, at the beginning of the season at a summer resort, took the plaintiff's keys to connect up the gas, which had been cut off, and as was the custom, lighted the gas with matches after connection made to test whether it was working satisfactorily. There was evidence tending to exclude any probability of fire except that used in the testing by defendant's employees; and that an hour or two after they left, witnesses seeing smoke from the dwelling, broke into it and saw large flames of gas from the gas piping where the defendant's agents had been at work, which caused the conflagration resulting in the loss of the dwelling: *Held*, sufficient evidence of defendant's actionable negligence to sustain a verdict in the plaintiff's favor. *Peterson v. Power Co.*, 243.

8. *Negligence—Woman—"Willful Injury"—Intent—Evidence.*—For the arrest for a woman under the provisions of C. S., 768, for "willful injury," etc., an actual intent is not necessary if the defendant's negligence is so gross as to manifest a reckless indifference to the rights of others. *Weathers v. Baldwin*, 276.

9. *Same—Arrest and Bail—Automobiles—Questions for Jury—Trials—Statutes.*—Evidence tending to show that the defendant in the action, a woman, was driving an automobile near the center of a large and populous town on Sunday, at the time the people were going to church, and with a speed in excess of that allowed by law, and without signal or other warning ran upon the sidewalk where the plaintiff was and struck with the machine and injured him, and apparently gave him no further thought, is sufficient for the jury to find an intent on the defendant's part to have willfully injured the plaintiff, and for the defendant's arrest under the provisions of C. S., 768. *Ibid.*

10. *Negligence—Children—Employer and Employee—Master and Servant—Instructions of Master—Custom—Waiver.*—Where there is evidence that the plaintiff's intestate, a boy under twelve years of age, was killed by the negligence of the defendant's driver on its ice wagon as the intestate was riding on the rear step thereof, and the defendant has introduced evidence that it had instructed its drivers not to per-

NEGLIGENCE—*Continued.*

mit children to ride on its wagons, it is competent for the plaintiff to show that the observance of this instruction was not insisted on, and its nonobservance was either known to the defendant or should have been known from its long continued violation, and that therefore the defendant had either acquiesced therein, or had consented to its repeal, or waived obedience to it. *Fry v. Utilities Co.*, 281.

11. *Same—Cities and Towns—Ordinances.*—Where there is evidence that the plaintiff's intestate, a boy about twelve years of age, was killed by the negligence of the driver on defendant's ice wagon, while the intestate was riding on the rear step of the wagon, in attempting to drive across a track in front of a moving street car, and the defendant has introduced an ordinance of the city prohibiting children from riding on wagons of this kind without the consent of the driver, evidence that children were habitually accustomed to ride on these wagons and were encouraged therein by the defendant's drivers, and that the driver of this particular wagon saw the intestate at the time he was riding thereon, and consented to his riding thereon, is sufficient to show that the intestate was not acting in violation of the ordinance in question. *Ibid.*

12. *Same.*—Where defendant ice company has permitted the custom of children to ride on its wagon in delivering ice to become established in violation of a city ordinance, it cannot take advantage of its own wrong by setting up the ordinance in defense to an action for the negligent killing of the plaintiff's intestate, a boy about twelve years of age, upon the ground that the intestate was himself violating the ordinance at the time he was killed. *Ibid.*

13. *Negligence — Contributory Negligence—Children—Instructions—Appeal and Error.*—While a child is not held to the same accountability as one of mature years for contributory negligence, it is held to that degree of care that ordinary prudence would require one having the mental and physical development of the particular child, under the circumstances of the injury; and an instruction that a boy, something less than twelve years of age, could not be guilty of contributory negligence, and also omitting the element of proximate cause, or the last clear chance, is reversible error. *Ibid.*

14. *Negligence — Wantonness — Contributory Negligence — Defenses.*—The doctrine of contributory negligence does not apply when the defendant's negligence in causing the injury in question is reckless, wanton, and in total disregard of the plaintiff's rights, and the verdict of the jury upon a trial involving this question may be construed as an affirmative finding when it so appears if viewed in the light of the charge and the evidence in the case. *Ibid.*

15. *Same—Evidence—Employer and Employee—Master and Servant—Respondeat Superior—Appeal and Error—New Trials.*—There was evidence in this case that the driver of the defendant's ice wagon knew that the plaintiff's intestate, a boy about twelve years of age, was riding on the rear step of the wagon, contrary to a city ordinance, and that a collision proximately caused the death of the intestate as the driver, at a place forbidden by the city ordinance, attempted to drive diagonally across a street car track in front of a rapidly moving street car, where the situation itself and the time of the act was

NEGLIGENCE—*Continued.*

observably dangerous for such purpose: *Held*, while the violation of the ordinance is not alone conclusive, it, with the other evidence, is sufficient to sustain a verdict of the jury finding that the negligence of the driver was reckless and wanton, and in utter disregard of the intestate's rights, for which the defendant is responsible as principal under the doctrine of *respondeat superior*, if it was the proximate cause of the injury alleged. *Ibid.*

16. *Negligence—Contributory Negligence—Burden of Proof.*—The burden of proof of contributory negligence is upon the defendant relying thereon, and on this trial: *Held*, the evidence was insufficient. *Tyree v. Tudor*, 340.

17. *Negligence—Contributory Negligence.*—There is no essential difference between negligence and contributory negligence, the former applying to the defendant and the latter to the plaintiff, and in either case is the want of due care in doing other than, or failing to do, what a reasonably prudent man would have done under the same or similar circumstances. *Moore v. Iron Works*, 438.

18. *Same—Proximate Cause.*—The plaintiff's contributory negligence to defeat his recovery in an action to recover damages for a personal injury alleged to have been received through the defendant's negligence, is such negligent act of commission or omission so concurring and coöperating with the negligent act of the defendant as to become the real, efficient, and proximate cause of the injury the plaintiff has sustained, or the cause without which the injury would not have occurred. *Ibid.*

19. *Negligence — Comparative Negligence — Statutes—Damages.*—The doctrine of comparative negligence is only recognized by our courts in instances coming within the meaning of the Federal Employers' Liability Act, and our own statute, C. S., 3467, and then only for the purpose of mitigating the damages or as a partial defense. *Ibid.*

20. *Same — Contributory Negligence—Instructions—Appeal and Error.*—Where the issue of plaintiff's contributory negligence arises in an employee's action against a private corporation, an instruction thereon that if the plaintiff's negligence contributed to his personal injury to the degree that he was "guilty," without preponderating, the defendant is not entitled to have the issue answered in its favor, for it must outweigh "the contentions of the plaintiff that he did not contribute," constitutes reversible error to the defendant's prejudice, being in effect an erroneous charge upon the principle of comparative negligence, inapplicable to the case. *Ibid.*

21. *Negligence — Evidence — Questions for Jury — Trials—Automobiles.*—Where damages for the negligent driving of an automobile is sought in the action, evidence that another was driving the owner's car at the time, in pursuance of his duties as defendant's employee, or about the defendant's business, at excessive speed upon the wrong side of a street, and caused damage to the plaintiff, riding in the opposite direction on his motorcycle, where he had the right to be, is sufficient to take the case to the jury. *Freeman v. Dalton*, 538.

22. *Same—Burden of Proof—Appeal and Error.*—In an action to recover damages, caused to the plaintiff by the alleged negligent driving of the

NEGLIGENCE—*Continued.*

defendant's automobile, where the evidence is conflicting as to the ownership of the automobile or whether the driver was at the time engaged in the business of the defendant, the making out of a *prima facie* case for the plaintiff does not raise a legal presumption of negligence, or cast upon the defendant the burden of disproving by the preponderance of the evidence his ownership, or that the machine was not being operated in his business, or shift the burden of the issue from the plaintiff, but raises only an inference upon which the jury may find the issue in the plaintiff's favor. *Ibid.*

NEGOTIABLE INSTRUMENTS. See Escrow, 1.

NEWLY DISCOVERED EVIDENCE. See Appeal and Error, 8.

NEW TRIALS. See Appeal and Error, 2, 8, 21, 51; Contracts, 3, 17; Evidence, 9, 30; Negligence, 15; Criminal Law, 12.

1. *New Trials—Verdict Set Aside—Courts—Discretion—Appeal and Error.* The discretion given by C. S., 591, to the trial judge to set aside a verdict, is not an arbitrary one to be capriciously exercised, but reasonably with the view to an equitable result in the correct administration of justice, and will not be reviewed on appeal except in cases of abuse thereof. *Bailey v. Mineral Co.*, 525.

2. *Same.*—Where the judge orders a verdict set aside, deeming it to be in the cause of justice, and as contrary to the weight of the evidence and in disregard of his instructions of the law thereon, he is acting within the discretion given him by C. S., 591. *Ibid.*

3. *Same—Agreement of Parties—Compromise.*—Where the losing party moves to set aside a verdict after the trial, as within the statutory discretion of the trial judge, and the judge intimates he will grant the motion, but the parties agree that he may determine the matter out of the term, in view of attempting to compromise the disputed matter; and not hearing from the parties the judge renews his previous intimation, and sets a time and place for hearing, at which one of the parties appears and refuses the suggestion of the judge as a basis of a just settlement, his then setting the verdict aside within his reasonable discretion deals with the record as it originally stood, and is not an abuse of the discretion given him by the statute, C. S., 591. *Ibid.*

NONRESIDENTS. See Injunction, 2; Removal of Causes, 1.

NONSUIT. See Railroads, 1, 2; Appeal and Error, 22, 40; Carriers, 3; Statutes, 4; Trials, 1; Evidence, 13, 28; Actions, 2, 4; Contracts, 17; Employer and Employee, 4, 9; Easements, 1, 4; Fires, 1; Pleadings, 4; Homicide, 5, 11; Intoxicating Liquor, 12, 25.

Nonsuit.—Upon this trial the evidence is held sufficient to sustain a conviction. *S. v. Clark*, 733.

NOTARY PUBLIC. See Deeds and Conveyances, 8.

NOTICE. See Eminent Domain, 8; Automobiles, 1; Drainage Districts, 3; Covenants, 3; Mortgages, 2; Carriers, 16; Landlord and Tenant, 6.

NUISANCE. See Eminent Domain, 15.

PARDON.

1. *Pardon—Parole—Conditions.*—Under the provisions of our State Constitution and statutes, a "parole" granted by the Governor to a prisoner imports a conditional pardon, and the Governor may cause his rearrest either upon his own admissions, or on such evidence as he may require, for violating the conditions which the prisoner has accepted under the terms of the parole. C. S., 7642, 7643, 7644, 7749, 7752; Const., Art. IV., sec. 8. *S. v. Yates*, 754.

2. *Same.*—The power of the Governor to grant a conditional pardon is generally subject to the limitation that the conditions imposed must not be illegal, immoral or impossible of performance, which do not apply to this case, wherein he is only required not to violate the statute law, and remain of good conduct. *Ibid.*

3. *Same—Breach of Conditions.*—Where the prisoner has accepted his freedom upon the terms of the conditional pardon from the Governor, his breach of such conditions avoids the pardon and cancels his right to further immunity from punishment. *Ibid.*

4. *Same—After Expiration of Term of Sentence—Punishment.*—The essential part of a sentence for a violation of the criminal law is the punishment for the offense committed, and not the time the sentence shall begin and end; and where the prisoner has accepted a conditional pardon from the Governor and has obtained his freedom, the breaking of the condition after the term would have otherwise expired, affords no legal excuse why he should not be recommitted to serve out the balance of his sentence. *Ibid.*

PARENT AND CHILD. See Libel, 4.

1. *Parent and Child—Advancements.*—An advancement is a voluntary and irrevocable gift of money or property, real or personal, *in præsenti* by a parent to a child with the intention on his part that it shall represent a part or the whole of his estate to which the donee would be entitled at his death. *Nobles v. Davenport*, 207.

2. *Same—Presumptions—Donor's Intent—Equality of Division.*—The legal presumption that when a parent dies intestate he intends an equality of division of his estate or property between his children is subject to rebuttal by parol evidence; and whether the transfer is to be regarded as a gift, or a sale, or an advancement, the ascertained intent of the grantor controls as it existed at the time of the transaction. *Ibid.*

3. *Same—Deeds and Conveyances—Life Estate Reserved—Estates.*—The question as to whether a conveyance of land by a father to his son should be construed as an advancement or sale is not affected by his reserving to himself a life estate therein. *Ibid.*

4. *Same — Evidence — Parol Evidence—Appeal and Error.*—To discover whether the transfer of property by the father in his lifetime to his child was intended by him as an advancement, gift, or sale, in whole or in part, the circumstances surrounding the interested parties at the time may be considered. *Ibid.*

5. *Same—Rebuttal.*—A substantial gift *in præsenti* by the parent to his child, by a conveyance of land in consideration of love and affection, or a nominal sum, is ordinarily presumed to be an advancement,

PARENT AND CHILD—*Continued.*

which presumption may be overcome, or rebutted where it is shown that the transfer had been made for a valuable or adequate consideration. *Ibid.*

6. *Same—Questions for Jury—Trials.*—A father conveyed a large portion of his lands to his son in consideration of love and affection, reserving a life estate, which deed was not registered, and made a conveyance of other lands to a daughter for the same consideration, which was afterwards registered and admitted to have been an advancement. Thereafter the donor conveyed to the son the same lands he had theretofore conveyed to him, expressing a consideration of love and affection and the sum of $700, receiving back a mortgage to secure the purchase-money notes, which was subsequently canceled of record, followed afterwards by a release of the life estate the grantor had reserved to himself in his former deeds. In an action by the donor's other children to declare the latter deed an advancement: *Held*, the evidence was sufficient to be submitted to the jury upon the donor's intent, as to whether the transfer was an advancement or sale, in whole or in part; and *held further*, that evidence as to the value of the *locus in quo* was erroneously excluded. *Ibid.*

PAROL. See Trusts, 1; Deeds and Conveyances, 9; Judgments, 3; Pardon, 1.

PAROL EVIDENCE. See Parent and Child, 1; Deeds and Conveyances, 3; Escrow, 1; Contracts, 13, 14, 24.

PARTIES. See Injunction, 2; Estates, 7; Appeal and Error, 9, 11, 22; Removal of Causes, 1; Judgments, 1; Eminent Domain, 16, Partition, 3.

Parties — Actions — Fraud—Contracts—Specific Performance—Deeds and Conveyances—Statute of Frauds—Statutes.—The plaintiff and another entered into a written contract of purchase of defendant's land, sufficient to bind the latter under the statute of frauds, C. S., 988, and the plaintiff alone brought this action, alleging fraud, and seeks to recover back the part payment of the purchase price made thereon by himself and the other person interested, who has not been made a party: *Held*, by his action the plaintiff repudiated the contract and renounced his right to specific performance, and such other person having an equitable interest in the subject of the action is a proper party with a right to assert such equity and to have the entire controversy settled in one action. C. S., 457. *Kendall v. Realty Co.*, 425.

PARTITION.

1. *Partition — Sales for Division — Commissioners—Contracts of Sale—Purchasers—Wrong Reports—Motion in Cause—Statutes.*—A commissioner appointed for the sale of land in proceedings for partition, after confirmation of sale to a private purchaser, filed a petition in the cause after notice alleging in effect that in addition to the purchase price he had reported, the purchaser had agreed to pay a larger sum to include his commission, etc., and had paid only the smaller sum, reported and confirmed, and refused to pay the balance as agreed after having received the deed from the clerk's office, where it had been deposited: *Held*, upon demurrer, the allegations of the petition must be considered as true, and it was reversible error for the trial judge to sustain the demurrer, and not require an answer to be filed to set the matters at issue for the purpose of proceeding to determine the controversy. C. S., 621. *Lyman v. Coal Co.*, 581.

PARTITION—*Continued.*

2. *Same—Judgments—Imposition on the Courts.*—Where the commissioner for the private sale of lands for division has withheld from the knowledge of the court the actual price the purchaser has agreed to pay, and reported a lesser sum, which the court has confirmed by final judgment, it is an imposition on the court, and will not conclude it from reopening the case on the petition of the commissioner in the cause, after notice, and affording the proper relief. *Ibid.*

3. *Partition — Sales for Division — Commissioners—Commissions—Agreement of Parties—Courts—Reports.*—The court will not permit the commissioner and parties in interest in proceedings to sell land for division among tenants in common, to fix among themselves without its knowledge the compensation of the commissioner, especially where the interests of minors are involved, and impose upon the court by the commissioner's reporting the purchase price in a net sum after deducting the agreed commissions, it being within the province of the court to allow such commissions as it may deem right and proper, and pass upon the sufficiency of the purchase price of the lands with all the facts before it. *Ibid.*

PARTNERSHIP. See Carriers, 10, 12; Appeal and Error, 22.

Partnership—Trials—Evidence—Questions for Jury.—In an action to recover on an account for gasoline sold and delivered to the one running a garage and another, there was evidence in plaintiff's behalf that he had presented the bill to both defendants and the latter exclaimed that he should have been informed before the account had gotten so large, that "we will straighten it up," and that he would get after his codefendant about it, with further evidence that one owned the building and the other was a tenant therein conducting his own business: *Held*, sufficient to be submitted to the jury upon the issue of partnership, binding both defendants to the payment of the account. *Oil Co. v. Banks*, 204.

PAYMENT. See Eminent Domain, 8; Insurance, Life, 1.

1. *Payment — Duress — Contracts — Evidence—Courts—Judicial Notice—War.*—Where there is evidence that the plaintiff, an electric power company, has induced the defendant, a manufacturer, to scrap and sell the steam power plant he was then using and enter into a contract with it for a term of years to furnish the electric energy required for the operation of the manufacturing plant, and after increasing the price, by agreement with the manufacturer, arbitrarily makes a further increase before the termination of the contract, during war conditions, and when the manufacturer could not get the electrical power elsewhere, *it is held*, the court will take judicial notice of the chaotic conditions prevailing during the war, and while the defendant is chargeable for the increase he has agreed to pay, the question is raised for the determination of the jury whether the defendant protesting against but continuing to pay the increase, did so under duress. *Power Co. v. Mfg. Co.*, 327.

2. *Same—Actions.*—Where a debt has been paid by one under duress in excess of that due the creditor under the existence of a contract, the amount in excess so paid may be recovered by the debtor in his action, there being no consideration therefor. *Ibid.*

PAYMENT—*Continued.*

3. *Payment—Application—Debt.*—Where a debtor owes two or more debts to the same person, the creditor must apply a partial payment thereon in accordance with the direction of the debtor made at or before the time the payment was made. *Thomas v. Bank*, 508.

4. *Same—Trusts—Contracts—Banks and Banking—Defalcation.*—A defaulting cashier of a bank used a part of the misappropriated funds in his father's business, and after the death of the latter, his heirs at law entered into a written agreement with the bank that the administrator repay the amount of the default out of the father's estate, to the extent available, and the defaulting son by the same instrument pledged certain of his notes and securities to the payment of the balance, the whole amount of the repayment not to exceed a certain sum: *Held*, the bank under the terms of the trust was not entitled to credit the proceeds of the notes and securities of the defaulting son, beyond the specified sum, without the consent of all of the parties to the agreement. *Ibid.*

PENALTIES. See Appeal and Error, 2; Statutes, 3; Sheriffs, 3, 5.

PERPETUITIES. See Game, 3.

PERSONAL INJURY. See Instructions, 6; Damages, 2.

PETITION. See Easements, 3.

PLEADINGS. See Contracts, 1; Removal of Causes, 2; Evidence, 1; Executors and Administrators, 5, 8; Issues, 2; Injunction, 4; Railroads, 6; Deeds and Conveyances, 7; Judgments, 2; Trespass, 2; Actions, 5.

1. *Pleadings—Interpretation—Lex Fori—Trusts—Fraud—Express Trusts.* Where suit is brought here to affect the foreclosure at a judicial sale of land in another state with a trust *ex malificio*, the pleadings will be construed under our own decisions, the *lex fori*, as to whether the allegations are sufficient to allege a constructive trust, liberally construed, or only an express trust: *Held*, in this case, a constructive trust was sufficiently alleged to be shown. *McNinch v. Trust Co.*, 34.

2. *Pleadings—Amendments—Actions—Statutes—Limitation of Actions.*—The principle by which a new cause of action may be introduced by amendment to the original complaint must be construed in connection with the right of the defendant to plead the statute of limitations, where the amendment in question amounts to a departure in pleading. *Capps v. R. R.*, 182.

3. *Pleadings—Contracts—Torts—Consistency.*—Where the complaint in an action for damages alleges that the defendant wrongfully dug a canal so as to interfere with plaintiff's right of ingress and egress to and from his lands, without providing a passway thereto, and it appears that the defendant had the right to dig the canal under agreement with the plaintiff, which he has set up in his answer, the allegation in the replication that the defendant had failed to construct the road as agreed is not inconsistent with the allegation in the complaint, upon the theory that the former alleged a cause *ex delicto* and the latter *ex contractu*, the alleged tort being founded upon the alleged breach of contract. *Berry v. Lumber Co.*, 384.

PLEADINGS—*Continued.*

4. *Same—Nonsuit—Trials.*—Where there is a variation between the complaint alleging a cause founded upon tort, and a replication alleging it to have arisen *ex contractu*, the former relating to the latter, it is a proper subject for special instruction upon the supporting evidence, and not a valid cause for nonsuit. *Ibid.*

5. *Pleadings—Debt—Judgment—Default Final.*—A complaint alleging a money demand for a sum certain with an express promise to pay is sufficient to sustain a judgment by default final for the want of an answer. C. S., 595. *Thompson v. Dillingham*, 566.

6. *Same—Clerks of Court—Statutes—Constitutional Law.*—C. S., 573, authorizing a judgment by default final for the want of an answer before the clerk of the court is not an unconstitutional interference with the jurisdiction of the judge of the court, the clerk being a component part of the Superior Court, and the exercise of the power of the judge being recognized and preserved by the right of appeal. *Ibid.*

POLICE POWERS. See Liens, 1.

POSSESSION. See Liens, 3; Landlord and Tenant, 1; Covenants, 1; Intoxicating Liquors, 2, 4, 21, 23; Criminal Law, 20.

POWERS. See Eminent Domain, 6; Wills, 6; Taxation, 1; Courts, 7.

PREFERENCES. See Receivers, 1.

PREJUDICE. See Appeal and Error, 5, 21, 51; Homicide, 1; Railroads, 3; Evidence, 30; Negligence, 6; Courts, 5; Criminal Law, 13; Instructions, 14.

PREMEDITATION AND DELIBERATION. See Homicide, 15, 18.

PREMIUM. See Insurance, Life, 1.

PRESUMPTIONS. See Appeal and Error, 5, 33, 57; Trials, 4; Parent and Child, 2; Criminal Law, 19, 20; Instructions, 4; School Districts, 16; Constitutional Law, 20; Intoxicating Liquors, 2, 21.

PRIMA FACIE CASE. See Negligence, 1; Elections, 1; Railroads, 2; Intoxicating Liquors, 23; Carriers, 3; Easements, 1; Covenants, 3.

PRINCIPAL AND AGENT. See Automobiles, 1; Carriers, 13; Contracts, 8, 10, 21, 26; Banks and Banking, 1, 3; Beneficial Associations, 1; Compromise and Settlement, 2.

1. *Principal and Agent—Contracts—Promise of Agent—Benefits Received—Estoppel.*—The foreign principal is answerable for the promise of its superintendent in charge of local construction, to pay an additional price to a material furnisher for a change in material from that originally specified, and is estopped by receiving the benefit to deny the validity of such promise. *Lane v. Engineering Co.*, 307.

2. *Principal and Agent.* *Westbrook v. McCrary*, 672.

PRINCIPAL AND SURETY. See Attachment, 2, 3; Judgments, 4, 5.

PRIVITY. See Cities and Towns, 7, 8, 9; Liens, 2, 5.

PROBATE. See Public Officers, 1; Deeds and Conveyances, 8, 12, 14.

PROCEDURE. See Eminent Domain, 3, 11; Removal of Causes, 2; Appeal and Error, 60; Judgments, 7.

Procedure—Supreme Court—Rules of Court—Constitutional Law.—The procedure in the Supreme Court is vested by constitutional authority entirely with this Court, without power of the Legislature to modify it. *S. v. Johnson*, 730.

PROCESS. See Actions, 6, 7; Appeal and Error, 25.

1. *Process—Summons—Alias—Continuity—Actions.*—The failure of service of the original summons in an action must be followed by alias or pluries writ or summons successively and properly issued in order to preserve a continuous single action referable to the date of its issue, for otherwise it is a discontinuance as to the defendant; and another summons served after the break in the chain is a new action. *Hatch v. R. R.*, 618.

2. *Same—Statutes.*—In an action to recover damages for the death by wrongful act, required by the statute to be brought within a year. C. S., 160, the process officer failed to make a valid service upon an agent of defendant corporation, by not leaving a copy of the process. and after the return term served the first summons on the defendant's president, and at the same time another process, marked by the clerk "alias original" summons, without anything in the second summons to indicate its alleged relationship to the original: *Held*, the service of the first summons being fatally defective, and the last not conforming to the law in respect to the issuance of alias summons so as to relate back to the original, the service upon the defendant's president after the period fixed as a condition to the right of action, is fatally defective, and the plaintiff cannot recover. *Ibid.*

3. *Same — Wrongful Death—Appearance—Waiver.*—Where the original service on a corporation is fatally defective for failure of the process officer to leave a copy of summons with defendant's agent as required by the statute, and another summons has been properly served on the defendant's president, but without preserving the continuity of the process, in an action to recover damages for a wrongful death under the provisions of C. S., 160: *Held*, the appearance of the defendant to resist recovery upon the ground that the plaintiff had not brought his action within the year, is not a voluntary appearance, and will not amount to a waiver of service of process within that period, as to the first summons, the service of the second summons being valid, and it being permissible for the defendant to await the plaintiff's evidence upon his allegation that he had brought his action within the time required by the statute as a condition annexed to his right thereof. *Ibid.*

PROFITS. See Landlord and Tenant, 7; Municipal Corporations, 4.

PROFIT A PRENDRE. See Game, 2.

PROHIBITION. See Eminent Domain, 3; Intoxicating Liquor, 10; Homicide, 1.

PROMISE OF MARRIAGE. See Seduction, 1.

PROOF. See Judgments, 4; Actions, 2; Covenants, 3; Larceny, 1.

PROPERTY. See Eminent Domain, 4; Taxation, 1; Attachment, 3.

PROSECUTION. See Criminal Law, 3; Elections, 3.

PROTECTOGRAPH. See Banks and Banking, 4.

PROXIMATE CAUSE. See Carriers, 6; Employer and Employee, 14; Fires, 2; Negligence, 18; Damages, 2; Instructions, 8.

PUBLIC-SERVICE CORPORATIONS.

Public-service Corporations—Corporations—Contracts—Increase in Charges—Corporation Commission.—Where a public-service corporation desires to increase its charges for electrical energy furnished to the owner of a manufacturing plant over those agreed upon by contract, it is the duty of the furnisher of the power to apply to the Corporation Commission for the right to charge the increase, and cannot otherwise raise the rate to the manufacturer, whose rights are acquired under the contract, without his assent. *Power Co. v. Mfg. Co.*, 328.

PUBLIC USE. See Eminent Domain, 1, 4.

PUBLIC OFFICERS.

Public Officers—Women—Justices of the Peace—Deputy Clerks—Deeds and Conveyances—Probate—Adjudication — Registration—Statutes.—A woman is qualified to act as a notary public since the adoption of the amendment to the Constitution of this State, Art. VII, sec. 7; and also to pass upon the proper probate of a deed to lands, and make a valid certificate for its registration, when thereto deputized by the clerk of the Superior Court under the provisions of our statutes, C. S., 935, 3305. *Preston v. Roberts*, 62.

PUNISHMENT. See Intoxicating Liquors, 15; Judgments, 16; Pardon, 4.

PURCHASERS. See Deeds and Conveyances, 6, 16; Judgments, 3; Partition, 1.

RAILROADS. See Appeal and Error, 2, 23; Carriers, 1, 14, 17; Instructions, 6; Cities and Towns, 1, 6; Courts, 1; Judgments, 1.

1. *Railroads — Negligence — Evidence — Nonsuit—Statutes—Comparative Negligence.*—In an action to recover damages of a railroad company for negligent injury caused to its employee, there was evidence tending to show that plaintiff, while performing his duty as a switchman, coupled a car attached to defendant's locomotive, while not in motion, and the injury was caused by the sudden movement of the locomotive by the engineer, without a signal from the plaintiff, contrary to custom or practice, and crushed the plaintiff's foot between the bumpers on the cars, causing the injury complained of: *Held*, though there was evidence of contributory negligence, its establishment would not be a complete defense, under the provisions of our recent statute, C. S., 3467, applying the principle of comparative negligence in such cases; and upon motion to nonsuit, evidence that the engineer properly acted on the signal of another employee will not be considered. *Lamm v. R. R.*, 74.

2. *Railroads—Burnings—Negligence—Sparks from Locomotive—Evidence Prima Facie Case—Questions for Jury—Trials—Nonsuit.*—A *prima*

RAILROADS—*Continued.*

facie case of negligence is established against a railroad when it is shown that a spark escaping from its locomotive burned plaintiff's property. *Cotton Oil Co. v. R. R.*, 95.

3. *Same—Instructions—Appeal and Error—Prejudicial Error.*—When such *prima facie* case is made out, it is sufficient, nothing else appearing, to warrant a finding for the plaintiff on the issue as to negligence, but it is not conclusive. The defendant may or may not introduce evidence in rebuttal at his election; but the defendant is not required to disprove negligence on its part. Throughout the trial the burden of the issue remains with the plaintiff. *Ibid.*

4. *Railroads—Employer and Employee—Commerce—Federal Employers' Liability Act.*—In an action to recover for the wrongful death of the plaintiff's intestate under the Federal Employers' Liability Act, it must be alleged and shown that the intestate, when the injury occurred causing his death, was engaged in the course of his employment in doing some act in relation to interstate commerce, as well as that his employer was also therein engaged with regard to the subject-matter of the action. *Capps v. R. R.*, 181.

5. *Same—Statutes—Courts—Conflict of Laws—Jurisdiction.*—The Federal Employers' Liability Act, in its application to a recovery of damages of a railroad company for a wrongful death, operates in relation to interstate commerce, while a State statute, not in accordance therewith, operates in relation in intrastate commerce, the jurisdiction of each being exclusive in its respective field. *Ibid.*

6. *Same — Pleadings — Amendments — Actions — Conditions—Precedent—Limitation of Actions.*—Where a State statute gives a right of action to the personal representatives of the intestate against a railroad company, for a wrongful death not existing either under the common law or the Federal Employer's Liability Act, upon the express condition that action be commenced within twelve months therefrom, the lapse of the statutory time not only bars the remedy but destroys the liability; and where the plaintiff has erroneously alleged a cause of action under the Federal statute alone, and attempts, after the expiration of the twelve months, by amendment, to set up a cause under the State law, the amendment will not relate back to the commencement of the action, but will be regarded in effect as a new and independent cause, the right to which the plaintiff has lost by his delay. *Ibid.*

7. *Railroads—Employer and Employee—Master and Servant—Federal Employers' Liability Act—Statutes — Wrongful Death — Limitation of Actions—Conditions Precedent.*—A statute of Virginia gave a special right of recovery against a railroad for wrongful death upon condition of bringing action in twelve months, or upon action brought and terminating without adjudication of its merits, it required the plaintiff to bring his second action within whatever balance of the period that may then remain of the stated time. In plaintiff's action in our courts, an amendment under defendant's objection was allowed plaintiff to his original cause laid under the Federal Employers' Liability Act, thereafter removed to the Federal Court, which held the plaintiff, not having brought his action in twelve months, had lost his right under the Virginia statute, and further holding that the cause did not

RAILROADS—*Continued.*

lie under the Federal law. Plaintiff then took a voluntary nonsuit, and within twelve months brought his action in our State court solely under the Virginia statute, whereunder the cause thereof had arisen: *Held*, by the voluntary nonsuit, and the lapse of time, plaintiff's right under the statute sued on had been lost by him. The construction of the Virginia courts of the statute in question is applied herein. *Ibid.*

RAPE. See Criminal Law, 14, 16, 17; Jury, 1.

RATIFICATION. See Compromise and Settlement, 2.

REAL PROPERTY. See Guardian and Ward, 2.

REASONABLE DOUBT. See Instructions, 16.

REBUTTAL. See Parent and Child, 5.

RECEIVERS. See Appeal and Error, 10. 11; Equity, 1; Attachment, 2.

Receivers—Clerk Hire—Preference—Statutes—Creditors' Suit—Deeds and Conveyances—Assignment for Creditors.—No preference is given either at common law or in equity, or by statute, for clerk hire in a store for services rendered prior to the appointment of a receiver for the owner, on application of creditors, C. S., 859, 860, 1113 (6), and no permissible interpretation therefor can be derived under our statutes applying to a voluntary assignment for the benefit of creditors. C. S., 1609, 1618, or the other sections of chapter 28. *Mfg. Co. v. Turnage*, 137.

RECEIVING STOLEN GOODS.

1. *Receiving Stolen Goods — Larceny — Indictment—Evidence—Questions for Jury—Trials.*—Where there is evidence that a colored nurse has stolen a diamond from her employer, which was missing on the night she spent in the house of her codefendant charged with receiving, and that her codefendant sold the diamond for about one-tenth of its value on the morning following, is sufficient of his receiving with knowledge that the diamond had been stolen to sustain a verdict convicting him of the offense. *S. v. Hauser*, 769.

2. *Same—True Owner.*—Where there is evidence that the codefendant in an action for larceny knew that a diamond had been stolen and that he had himself solen it from the thief, it is immaterial whether he had stolen it from the thief or the true owner, both acts being against the right of the true owner, and chargeable in the same bill as parts of the same illegal asportation. *Ibid.*

RECORDS. See Appeal and Error, 11, 20; School Districts, 16; Habeas Corpus, 5.

REFERENCE. See Appeal and Error, 27, 29, 30, 31, 32, 34, 35, 36; Deeds and Conveyances, 18.

REFORMATION. See Seduction, 2.

REGISTRATION. See Public Officers, 1; Mortgages, 3; Deeds and Conveyances, 12, 14, 16.

REHEARING. See Appeal and Error, 6.

RELATIONSHIP. See Husband and Wife, 1, 4, 5, 8; Marriage, 1.

REMAINDERS. See Deeds and Conveyances, 2.

REMAND. See Appeal and Error, 60.

REMEDIES. See Injunction, 11; Landlord and Tenant, 3.

REMOVAL OF PROPERTY. See Guardian and Ward, 1.

REMOVAL OF CAUSES.

1. *Removal of Causes—Transfer of Causes—Venue—Parties—Nonresidents—Statutes.*—The county of the residence of the defendant, in an action upon alleged breach of contract, by a nonresident plaintiff, is the proper venue. C. S., 469, 470, 637. *Cotton Oil Co. v. Grimes*, 97.

2. *Same—Courts—Clerks of Court—Jurisdiction—Procedure—Pleadings.*—Where the clerk of the Superior Court orders the action upon contract removed to the county of the defendant's residence, and the plaintiff, a nonresident, has appealed therefrom to the judge, who in term orders the cause transferred and the defendant has complied with the requisites of the statute in filing a written motion in apt time, the action of the trial judge is a valid exercise of his jurisdictional authority. *Ibid.*

3. *Removal of Causes—Transfer of Causes—Motions—Statutes—Courts—Jurisdiction—Clerks of Court—Writing—Appeal—Appeal and Error.*—Where the defendant has filed, in apt time with the clerk of the court a motion, with prayer for the dismissal of the action, but based upon sufficient allegations of improper venue, whereupon the clerk orders the cause removed to the proper county and the plaintiff appealed to the Superior Court, and the judge at term orders the cause removed, the fact that the defendant first moved to dismiss under the written motion does not affect the authority of the judge to order the cause removed, and on appeal to the Supreme Court a statement of record that defendant filed a written motion to dismiss, negatives the exception that it was an oral motion, not in conformity with the requirements of the statute. *Ibid.*

4. *Removal of Causes—Transfer of Causes—Actions—Venue—Statutes—Lands—Estates—Title.*—Where the owner of lands has sold them at public sale, by a plat showing various divisions thereof, and the purchaser of two of them brings suit to set aside the transaction and to cancel certain of his notes given for the deferred payment of the purchase price, alleging a fraudulent representation by the owner as to the quantity of land in dispute in one of these lots, without which he would not have purchased, the controversy involves such an interest in the lands as required by C. S., 463, to be brought in the county where the land is situated, giving the owner the right to specific performance should he sustain his defense, and on motion aptly and properly made, it will be removed to the proper county when the suit has been brought in another county from that wherein the land is situated. *Vaughan v. Fallin*, 318.

5. *Removal of Causes—Transfer of Causes—Jurors Drawn from Other Counties—Courts—Discretion—Statutes.*—The trial judge, when refusing defendant's motion to remove an action for homicide to another county, may, in the exercise of his sound discretion, have the jurors

REMOVAL OF CAUSES—*Continued.*

summoned from any adjoining county, or from any county in the same judicial district, or have the jurors drawn from the jury box of such county. C. S., 473. *S. v. Kincaid*, 709.

RENT. See Deeds and Conveyances, 4; Landlord and Tenant, 3.

REPAIRS. See Negligence, 1.

REPLY. See Appeal and Error, 54.

REPORTS. See Appeal and Error, 11; Partition, 1, 3; Taxation, 1.

REPUTATION. See Evidence, 24.

REQUESTS. See Appeal and Error, 7; Instructions, 2, 10.

RESALE. See Contracts, 5, 6, 7.

RESERVATION. See Game, 2, 5, 7, 8; Deeds and Conveyances, 6.

RES GESTAE. See Criminal Law, 23.

RES IPSA LOQUITUR. See Negligence, 1, 2, 3.

RESISTING OFFICER. See Arrest, 1, 2; Criminal Law, 23.

RES INTER ALIOS ACTA. See Evidence, 12.

RESPONDEAT SUPERIOR. See Negligence, 15.

RETROACTIVE LAWS. See Constitutional Law, 9.

REVOCATION. See Contracts, 8.

RIGHTS. See Liens, 3; Game, 3, 8; Appeal and Error, 59; Courts, 8.

RIGHT OF WAY. See Appeal and Error, 23.

ROAD DISTRICTS. See Roads and Highways, 3.

ROADS AND HIGHWAYS. See Constitutional Law, 2; Eminent Domain, 9.

1. *Roads and Highways — Condemnation — Dwellings — Trees — Yards — Legislation—Acts—Constitutional Law.*—Unless prohibited by the Constitution, the power of the State to appropriate private property to public use extends to every species of property within its territorial jurisdiction, and where a public-local act creates a county highway district and gives to it, broadly and without restriction, the right to condemn private property for highway purposes, the power so given will include dwelling-houses, trees and yards of the owners of land lying upon the roadway, unless such power is excluded under general or other State laws applicable. *Clifton v. Highway Com.*, 211.

2. *Same—General Laws—Restrictions—Statutes.*—The Public-Local Laws of 1921, ch. 447, creates the Duplin County Highway District, giving it general powers of condemning lands for road purposes without reservation, and the general statutes not being applicable, it is held that the general right to condemn for the purposes designated does not exclude the dwelling, trees, or yards of the private owners, as in other specified instances. C. S., 706, 714, 3668, 3669, 3746, and ch. 70, Art. IV, sec. 2. *Ibid.*

ROADS AND HIGHWAYS—*Continued.*

3. *Roads and Highways—Road Districts—Bonds—Taxation—Sinking Fund—Interest—Statutes.*—Where the Legislature has created a special township road district and authorized the county commissioners to issue bonds, and for the purpose of providing for the "payment of said bonds and the interest thereon, and for the construction, improvement, and maintenance of the roads of said township," to levy a special tax of not less than 25 cents nor more than 75 cents on the $100 worth of property, the act, by the use of the words "to provide for the payment of said bonds," does not authorize a present tax levy for the accumulation of a sinking fund for the retirement of the bonds at their maturity forty years hence, but the bonds are valid. Where the commissioners have levied a tax for the purpose of creating an unauthorized sinking fund, in addition to what is required for the interest, an injunction will lie as to this difference; and the judgment of the Superior Court properly restricted the commissioners to levy a tax sufficient only for the payment of interest. *Cooper v. Comrs.*, 231.

RULES. See Deeds and Conveyances, 1; Employer and Employee, 1; Damages, 1; Intoxicating Liquors, 8.

RULES OF COURT. See Appeal and Error, 55, 56; Procedure, 1.

RULE OF THE PRUDENT MAN. See Contracts, 3.

RULE IN SHELLEY'S CASE. See Estates, 2, 3.

SAFE PLACE TO WORK. See Employer and Employee, 2, 17.

SALARY. See Constitutional Law, 4, 6.

SALES. See Dower, 1; Partition, 1, 3; Vendor and Purchaser, 1; Deeds and Conveyances, 11, 14; Estates, 6, 8, 9, 10; Guardian and Ward, 2; Intoxicating Liquors, 23, 24.

SATISFACTION. See Mortgages, 3; Homicide, 17.

SCHOOLS. See Constitutional Law, 10, 12, 16, 18.

SCHOOL DISTRICTS. See Statutes, 5, 6.

1. *School District—Consolidated Districts—Statutes—Taxation—Constitutional Law.*—Under the provisions of C. S., 5469 *et seq.*, and ch. 179, sec. 1, of the Laws of 1921, the county board of education has a constitutional right to consolidate and establish local-tax districts and special-chartered districts "for school purposes," when the existing rates of taxation therefor are the same. *Paschal v. Johnson*, 129.

2. *Same—Elections—Approval of Voters.*—Special school-tax districts, organized and exercising governmental functions in the administration of the school laws, are *quasi*-public corporations subject to the constitutional provisions in restraint of contracting debts for other than necessary purposes, except by the vote of the people of a given district, Const., Art. VII, sec. 7; and, *semble*, that where an existent tax and nontax district are thereunder consolidated, it would require the submission of the question to those living within the district thus formed, but outside of the district that has theretofore voted the tax. Const., Art. VII, sec. 7; C. S., 5530. *Ibid.*

SCHOOL DISTRICTS—*Continued.*

3. *Same—Bonds.*—Where there has been a valid consolidation of local-tax school districts, having an equal tax rate for the purpose, by proper proceedings under the statute the new district may then approve the question of an additional special tax, and where this has been done under the authority of a valid statute, and an issue of bonds properly approved by the voters, such bonds are constitutional and valid. *Ibid.*

4. *Same—Corporations.*—Under our statutes, in general terms, relating to special school districts, apparently all of them within the State are incorporated and given powers and duties in reference to the issue and payment of bonds for school purposes, by the board of trustees, when approved by the voters of the particular district upon an election duly held for the purpose; the term board of trustees, including the principal or governing body, by whatsoever name called, C. S., 360; Laws 1920, ch. 87; Laws 1921, chs. 244 and 133; and where two special school districts, having an equal rate of taxation, have been consolidated under the provisions of C. S., 5469 *et seq.*; Laws 1921, ch. 179, sec. 1; such district so consolidated may issue valid bonds for the purposes stated, when it has complied with the appropriate statutes. *Ibid.*

5. *School Districts—Taxation—Consolidation—Statutes—Nonlocal Tax Districts—Elections—Constitutional Law.*—The combination or consolidation of local school tax districts with territory that has not voted a special tax for the purposes of schools must fall within the provisions of C. S., 5530, whereby the proposed new territory is required to vote separately upon the question of taxation, in conformity with our Constitution, Art. VII, sec. 7. *Perry v. Comrs.*, 387.

6. *School Districts—Consolidation — Statutes—Taxation—Outlying Territory—Election—Constitutional Law.*—The application of the provisions of C. S., 5526, to the formation of new local school tax districts without regard to township lines, etc., refers primarily to instances where new districts are created or formed, as therein prescribed, out of territory exclusive of special tax districts, or out of territory having the same status throughout its entirety, in relation to the then existing school tax or taxes, so as to give every voter a fair chance, uninfluenced by other considerations, to declare with his ballot whether or not he wishes to be taxed for the creation and maintenance of the district proposed. *Ibid.*

7. *Same—High Schools.*—In this case is presented the question of a combination of several local school tax districts with a further territory within which no special school tax has been voted, C. S., 5530, and the question of the establishment of a central high school for a given township, under C. S., 5511, is not presented. *Ibid.*

8. *Same—Amendatory Statutes.*—The authority given the county board of education to redistrict the entire county or part thereof, and to consolidate school districts, etc., C. S., 5473, is amended by Public Laws of 1921, ch. 179, providing, among other things, for such consolidation of existing districts under a uniform rate of taxation not exceeding the lowest in any one district, meets the requirements of our Constitution, Art. VII, sec. 7, but to the extent the amendatory statute permits consolidation of local school tax districts with adjacent territory or local schools that have never voted any tax, the provisions of C. S.,

SCHOOL DISTRICTS—*Continued.*

5530, must apply so as to permit those living in such proposed new territory to vote separately upon the question of taxing themselves for the purpose. *Ibid.*

9. *Same.*—The provisions of Public Laws of 1921, sec. 1, ch. 179, authorizing local school tax districts "to vote special tax rates for schools on the entire district according to law" apply to future levies after the consolidation of the original districts, or after the unification of the different tax rates have been affected in accordance with our organic and valid statutory law in pursuance therewith. *Ibid.*

10. *Same—Equal Taxation—Debt.*—Where the county board of education, acting under the provisions of C. S., 5473, amended by Public Laws of 1921, ch. 179, attempt to consolidate a local school tax district with nonlocal tax districts, *semble*, C. S., 5531, 5532, would apply, whereunder no such special tax district may be established "when it is in debt in any sum whatsoever": *Held*, there should be an election held separately for the voters of the new territory to pass upon the question of taxing themselves, for the purposes of the proposed district under the provisions of C. S., 5530. *Riddle v. Cumberland*, 180 N. C., 321, cited and distinguished. *Ibid.*

11. *School Districts—Creation of Districts—Combination of Districts.*—C. S., 5526, providing for the creation of a special school tax district by the county board of education without regard to township lines, upon an election to be held within the proposed district, after notice, etc., refers to territory having no special school tax and has no application to the enlargement of such district under the provisions of C. S., 5530, wherein one or more school tax districts have already been established and there is other contiguous territory sought to be included which has not voted any special school tax. *Hicks v. Comrs.*, 394.

12. *Same—Outlying Territory—Vote of the Electors—Elections.*—Where one or more special school tax districts have been established under the provisions of our statutes applicable, such districts may not extend their territory to include other districts and adjacent territory that have not voted a special tax, without the question having first been submitted to and approved separately by the voters of the outlying territory, and giving them the right to independently determine for themselves whether they shall be specially taxed, in the amount proposed. C. S., 5530. The distinction between *Riddle v. Cumberland*, 180 N. C., 321, and *Perry v. Comrs.*, *ante*, 387, and this case, shown and commented upon by *Walker, J.* *Ibid.*

13. *Same—Enlargement of Existing District.*—In proceedings to establish a special school tax district under the provisions of C. S., 5526, it appeared that therein was included several local tax districts already established, and also territory wherein no special tax had been voted, and the proceedings were properly instituted by only one of these local school tax districts: *Held*, the proceedings were for the enlargement of the petitioning local tax district, and required that the others therein should also have proceeded regularly under the statute and that the electors in the proposed part that had not voted a special tax be permitted to vote separately upon the question of the contemplated increase for the designated purpose. C. S., 5560. *Ibid.*

SCHOOL DISTRICTS—*Continued.*

14. *School Districts—Discretion of Board—Courts—Injunction.*—The courts will not interfere with the control and supervision of the county board of education in the exercise of its statutory discretion given in the formation of school districts and their consolidation, or intervene in behalf of any one who supposes himself to be aggrieved by their action therein, except upon a clear showing that it was acting contrary to law, and then they will only restrain its action to the extent necessary to keep it within the law and the rightful exercise of its powers. *Davenport v. Board of Education*, 570.

15. *Same—Combination of Districts—Location of Schoolhouses.*—A schoolhouse in a special school tax district of a county having been burned, the county school board consolidated this with another such special district, made provisions for the lower grades in the first district, and arranged for the attendance of the higher grades at the schoolhouse in the district with which it had been consolidated; and the taxpayers of the first district sought in their suit to enjoin the action of the county board upon the ground of inconvenience, etc., of the higher grade of children attending the school in the enlarged district. It appearing that the tax rates of the two districts were the same, and that the board was in the exercise of its legal right in making the consolidation, *it is held* that the county board was in the lawful exercise of its discretion given them by the statute, and the courts will not therewith interfere. *Ibid.*

16. *Same—Appeal and Error—Presumptions—Findings of Fact—Record.*—Where the judge of the Superior Court has refused to grant an injunction against the exercise of the statutory discretion of a county board of education in consolidating two special tax school districts within the county, arranging for the attendance at various schoolhouses for the lower and upper grades of the children of the district, but has found no facts upon which he has based his rulings, his action will be presumed as correct on appeal, it being for the appellant to show error, and on appeal the Supreme Court will assume that he has based his conclusion of law upon affidavits and other evidence appearing of record that fully support them. *Ibid.*

17. *School District—Bonds—Taxation—Statutes—Substantial Compliance.*—Where the provisions of a public-local law have been strictly complied with as to consolidating the school districts of the county, for acquiring school sites, building and repairing schoolhouses thereon, and for an issuance of bonds therefor, upon the petition of one-fourth of the voters of the consolidated school district to the county commissioners, endorsed by the board of education, except that the petition was signed before the order of consolidation had been made, the signing of this petition beforehand, and presented as the statute required, is not of the substance, and will not alone render invalid the bonds issued upon the approval of the voters of the consolidated district. *Wilson v. Comrs.*, 638.

18. *School Districts — Statutes — Special Statutes — Exceptions to General Laws.*—Where the provisions of a special statute, authorizing the consolidation of school districts within the county, have been complied with, objection to the validity of the issue on the ground that the order for the election was too indefinite as to specifying the amount of

SCHOOL DISTRICTS—*Continued.*

interest to be paid thereon under the requirement of our general statutes, C. S., 5676 *et seq.*, is untenable, for both the local and the general law having been passed at the same session of the Legislature, and being in force at the same time, the local law will prevail as an exception to the general law. *Ibid.*

SEARCH AND SEIZURE. See Intoxicating Liquors, 2.

SEDUCTION.

1. *Seduction—Action — Tort — Damages—Promise of Marriage—Criminal Law—Statutes.*—It is only necessary for plaintiff's recovering damages in her civil action, in tort, for wrongful seduction, to show that the defendant induced the intercourse by persuasion, deception, enticement, or other artifice; not requiring, as in prosecution under the criminal statute, C. S., 4339, that the intercourse was procured under a promise of marriage, though when existent this may be shown in the civil action as a means used by the defendant to accomplish his purpose. *Hardin v. Davis*, 46.
2. *Same—Reformation of Female—Previous Unchastity.*—It is not required that the woman should have always been chaste and virtuous to recover damages in tort for her seduction, for it is sufficient if by her conduct and rectitude she had reformed and was virtuous and chaste at the time of the defendant's wrongful acts in procuring the seduction, for then she will have become innocent in the eyes of the law. As to whether such reformation is required in the suit of the father is not decided in this case. *Ibid.*
3. *Seduction—Action—Tort—Evidence — Instruction—Unsupported Testimony of Prosecutrix—Appeal and Error.*—In the plaintiff's civil action to recover damages in tort for her seduction, the weight and credibility of her evidence are for the jury to determine; and an instruction in such action, as distinguished from a criminal indictment under the provisions of C. S., 4338, that her unsupported evidence is insufficient to warrant a verdict in her favor, is reversible error. *Ibid.*

SEIZIN. See Covenants, 1; Intoxicating Liquors, 4.

SELF-DEFENSE. See Homicide, 19, 20.

SENSITIZED PAPER. See Banks and Banking, 4.

SENTENCE. See Habeas Corpus, 6; Judgments, 8, 14, 16; Pardons, 4.

SERVICE. See Actions, 7; Appeal and Error, 25.

SERVICES. See Husband and Wife, 9.

SETTLEMENT. See Sheriffs, 2, 3.

SHERIFFS. See Attachment, 3; Deeds and Conveyances, 20; Homicide, 21.

1. *Sheriffs—Taxes—Compensation—Fees—Salaries—Statutes.*—The provisions of chapter 101, Public Laws of 1917, allowing 5 per cent to sheriffs for the collection of taxes upon an amount not exceeding fifty thousand dollars, and in excess thereof 2½ per cent, etc., expressly excluded sheriffs whose compensation was fixed upon a salary basis; afterwards modified by the laws of 1919, but declared by the extra

SHERIFFS—*Continued*

session of the Legislature of 1920, ch. 1, sec. 10, as not to repeal any local or general law regulating the salaries or fees of county officers except so far as such local or general laws were in conflict with the provisions that sheriffs should receive 5 per cent on all privilege or license fees collected, etc.: *Held*, the fees to be paid the sheriff are under legislative control, and a sheriff upon a salary basis who received the tax book for 1920, after the laws of 1920 were effective, is not entitled to any commissions on taxes collected for that year that did not fall within the exception made by the statute. *S. v. Gentry*, 827.

2. *Same—Extension of Time for Settlement.*—Where the sheriff has been put upon a salary basis for the collection of taxes for a certain year, and time for settlement has been extended by the county commissioners to a following year, wherein his compensation has been placed by legislative enactment upon a fee basis, the extension of the time was a matter of grace and did not fall within the prospective intent of the later statute as to commissions allowed for the sheriff's compensation. *Ibid.*

3. *Same—Settlement—Penalties.*—The Legislature has the power to impose penalties on the sheriff for his delay or failure to make settlement with the proper county authorities within a stated time, and while statutes of this character should be strictly construed, no interpretation is required beyond the plain meaning of the statute clearly expressed, or exempt the sheriff from the payment of the penalty when he has failed to have obtained an extension of time from the county commissioners as required by the statute in such cases. *Ibid.*

4. *Same—Accounting—Auditing.*—Where a sheriff of a county has failed to make settlement of money collected for taxes, as required by law, but has unsuccessfully sought to obtain an extension of time from the county commissioners, he may not successfully resist the statutory penalty under the provisions of C. S., 8050, on the ground that the county board of commissioners had not appointed a committee to audit the account between him and the treasurer, especially when the commissioners had appointed a special auditor who could have acted on the account at any time. *Ibid.*

5. *Sheriffs — Taxes — Penalties — Judgments—Actions—Facts at Issue—Issues.*—The penalty of $2,500 recoverable as a forfeiture against a sheriff under the provisions of C. S., 8051, is where he fails, neglects, or refuses to make settlement or to render an account to the county treasurer and auditing committee upon demand; or his failure, neglect or refusal to pay over the amount rightfully found to be due after account had or settlement made; and a recovery of such penalty may not be properly allowed in a judgment upon an affirmative finding, in an action where the cause was heard and determined upon the single question as to whether the defendant sheriff had failed to pay over the amount which the plaintiff claimed to be due. *Ibid.*

SIGNATURE. See Banks and Banking, 1.

SINKING FUND. See Roads and Highways, 3.

SLANDER. See Contracts, 22; Libel, 1.

SPECIFIC PERFORMANCE. See Parties, 1.

SPEED. See Municipal Corporations, 3; Automobiles, 4.

SPIRITUOUS LIQUORS. See Criminal Law, 8, 9, 10; Intoxicating Liquors; Judgments, 11, 14.

STATE. See Appeal and Error, 59.

STATE HIGHWAY COMMISSION. See Eminent Domain, 9.

STATEMENT. See Appeal and Error, 14.

STATE TAX COMMISSION. See Injunction, 15; Taxation, 1.

STATUTES. See Cities and Towns, 4; Constitutional Law, 1, 2; Roads and Highways, 1, 2; Intoxicating Liquor, 6; Appeal and Error, 2, 6, 14, 47, 57; Parties, 1; Carriers, 2, 17; Estates, 1, 5, 6, 10; Cities and Towns, 1, 5, 8; Sheriffs, 1; Constitutional Law, 1, 2, 7, 9, 11, 12, 18, 19, 21; Eminent Domain, 1, 3, 5, 10, 16; Habeas Corpus, 4; Evidence, 2, 18, 25, 26, 28; Liens, 1; Public Officers, 1; Criminal Law, 1, 6; Railroads, 1, 5, 7; Seduction, 1; Wills, 1; Executors and Administrators, 4, 10; Husband and Wife, 1, 4, 5; Roads and Highways, 2, 3; Mortgages, 1, 5; Taxation, 1; Pleadings, 2, 6; Receivers, 1; Removal of Causes, 1, 3, 4, 5; School Districts, 1, 5, 6, 8, 17, 18; Game, 1; Costs, 1, 2; Negligence, 9, 19; Attachment, 1; Actions, 2, 5; Banks and Banking, 2, 7; Contempt, 2; Municipal Corporations, 2; Process, 2; Elections, 3, 4; Intoxicating Liquors, 5, 9; Automobiles, 4, 5; Courts, 6; Instructions, 12, 15; Deeds and Conveyances, 7, 8, 11, 12, 15; Guardian and Ward, 1; Judgments, 11; Injunction, 14; Limitation of Actions, 1, 6; Partition, 1; Easements, 2; Road Districts, 18.

1. *Statutes—Interpretation—Intent—Literal Construction.*—A statute is interpreted to ascertain and enforce its intent and meaning from its language, and where it is plain, free from ambiguity, and expresses a single, definite, and sensible meaning, that meaning is conclusively presumed to be the one intended, and a literal interpretation is given it by the courts. *Mfg. Co. v. Turnage*, 137.

2. *Statutes—Amendments—Interpretation.*—The language of a statute, or of an amendment thereto, is presumed to have some meaning, and will be so construed in permissible instances. *Mitchell v. R. R.*, 162.

3. *Same—Carriers of Goods—Penalties—Transportation—Delivery—Negligence.*—The penalty imposed upon a carrier for unreasonable delay in transportation of goods, was judicially determined not to apply to delivery under the provisions of Revisal (1905), sec. 2632, and hence a subsequent amendment by the Laws of 1907, that such delay shall not be construed as referring to delay in starting the shipment, but shall apply also to "its delivery at its destination within the time specified," with the further provision that the carrier shall be relieved from the penalty if it is established to the satisfaction of the justice of the peace or the jury that the delay was incident to causes that could not be foreseen in the exercise of ordinary care: *Held*, C. S., 3516, in which these statutes are brought forward, extends the penalty to cases of negligent default in the carrier's making delivery of the freight to the consignee. *Ibid.*

STATUTES—*Continued.*

4. *Same—Evidence—Questions for Jury—Nonsuit—Trials.*—In an action for the penalty prescribed for the unreasonable transmission and delay in the delivery of goods by the carrier, there was evidence that a shipment of various articles was transported by the carrier to destination, and all were received by the consignee, except one of them, which was missing, and remained in the carrier's warehouse beyond the statutory reasonable time: *Held*, sufficient upon the question of the carrier's liability for the penalty, and a motion as of nonsuit, and a prayer for instruction directing a verdict on the evidence for defendant, were properly refused. *Wall v. R. R.*, 147 N. C., 407, cited and distinguished. *Ibid.*

5. *Statutes—Interpretation—In Pari Materia—School Districts.*—The various statutes relating to the establishment of local school tax districts with regard to approval of the voters will be so construed by the courts as to harmonize their provisions, when possible, and give to each and every one its proper significance, if such can fairly and reasonably be done. *Perry v. Comrs.*, 388.

6. *Statutes, in Pari Materia—School Districts—Special Tax—Elections.*—C. S., 5526, providing for the creation of new local school tax districts, and section 5530 requiring the question of an enlargement of an existing special school tax district to be submitted separately to the voters of the proposed new territory are to be construed *in pari materia*, and the provisions of each are held reconcilable with those of the other. *Hicks v. Comrs.*, 395.

7. *Same—Taxation—Elections.*—Laws of 1921, ch. 179, providing for the consolidation and adjustment of rates of taxation and authorizing the voters of a district so consolidated to vote special tax rates for the schools in the entire district, etc., should be construed to harmonize with C. S., 5530, and the provisions of the former statute do not affect or impair the requirement of the latter one, that for an extension of the boundaries of an existing local school tax district or districts, the approval of the tax proposed must first be given by the voters in the proposed new and contiguous territory. *Ibid.*

8. *Same—Abolition of Districts.*—Under the provisions of C. S., 5530, a local tax school district may be abolished by the act of creating a new one of which it is a component part, while section 5531 is restricted simply and singly to the abolition of an existing district, and so construed: *Held*, these sections are in harmony with each other. *Ibid.*

STATUTE OF FRAUDS. See Contracts, 1; Deeds and Conveyances, 3; Judgments, 3; Parties, 1.

STEAM. See Negligence, 4.

STOLEN GOODS. See Criminal Law, 20.

STREAMS. See Boundaries, 1.

STREETS. See Eminent Domain, 13.

STREET IMPROVEMENTS. See Cities and Towns, 1, 6, 7, 9.

SUBPŒNA. See Evidence, 22.

SUIT. See Evidence, 6; Actions.

SUMMONS. See Actions, 6; Appeal and Error, 25; Process, 1.

SURPLUSAGE. See Criminal Law, 11.

SUPERIOR COURTS. See Eminent Domain, 16; Courts.

SUPREME COURT. See Procedure, 1; Courts.

TAXATION. See Statutes, 6, 7: Cities and Towns, 8: School Districts, 1, 5, 6, 10, 17; Constitutional Law, 1, 2, 3, 8; Sheriffs, 1, 5; Evidence, 12; Roads and Highways, 3; Injunction, 15.

Taxation—State Tax Commission—Report of Property Valuation—Statutes—Adoption by Legislature—Powers—Functus Officio—Injunction. The State Tax Commission was *functus officio* after the Legislature had approved and adopted its final report of the assessment and value of property, made in pursuance of Laws 1919, ch. 84, transmitted through the Governor, and could not thereafter, pending appeal or otherwise, order a reduction in the value of the property of a certain manufacturing plant in a county that is incorporated into the value of the property of that county upon which the necessary taxes were to be computed; and where the county has collected the taxes upon this reduced valuation, a permanent injunction against the proper officers of the county from collecting taxes upon this difference in valuation is improvidently allowed, and will be dissolved in the Supreme Court, on appeal. *Mfg. Co. v. Comrs.*, 553.

TENDER. See Carriers, 13.

TERMS. See Instructions, 2; Constitutional Law, 12.

TERRITORY. See School Districts, 6, 12.

TESTIMONY. See Seduction, 3.

THREATS. See Homicide, 18.

TIMBER. See Drainage Districts, 1; Appeal and Error, 22: Deeds and Conveyances, 6, 7; Trespass, 3.

TIME. See Insurance, Life, 1; Appeal and Error, 47; Sheriffs, 2.

TITLE. See Deeds and Conveyances, 10, 14, 16; Attorney and Client, 1; Easements, 1; Limitation of Actions, 1; Removal of Causes, 1: Courts, 4; Covenants, 1, 2, 3; Evidence, 4; Attachment, 2; Instructions, 1: Mortgages, 1; Wills, 5, 9; Landlord and Tenant, 1; Actions, 3.

TOOLS. See Employer and Employee, 10, 11, 16.

TORT. See Seduction, 1, 3; Courts, 2: Banks and Banking, 4: Pleadings, 3.

TRADES. See Landlord and Tenant, 7.

TRANSACTIONS AND COMMUNICATIONS. See Evidence, 2.

TRANSFER OF CAUSES. See Removal of Causes, 1, 3, 4, 5.

TRANSPORTATION. See Statutes, 3; Intoxicating Liquors, 3.

TREES. See Roads and Highways, 1.

TRESPASS. See Boundaries, 1; Covenants, 6.

1. *Trespass—Damages—Equity—Cloud on Title—Actions—Costs—Trials.* In an action for trespass and for damages the plaintiff may not abandon these contentions upon the trial, and have the court consider the action as an equitable one to remove a cloud upon the title, and so avoid the payment of the full amount of the costs incident to the litigated issues. *Clemmons v. Jackson*, 382.

2. *Same—Pleadings—Issues—Appeal and Error.*—Where, in an action for trespass and for damages, the plaintiff alleged title to the *locus in quo* under his deed, and the defendant, admitting this paper title, alleged ownership in a part thereof by adverse possession: *Held*, upon the withdrawal of all claims of trespass and the consequent damages, it was error to the defendant's prejudice for the trial judge to regard the action as a suit to remove a cloud upon the plaintiff's title, ignore the issues raised by the pleadings, and tax each party with one-half of the costs. *Ibid.*

3. *Trespass—Standing Timber—Damages—Boundaries.*—Where the plaintiff claims timber growing upon lands by adverse possession of the lands, depending upon whether defendant's boundary was the high- or low-water mark of a stream, it is competent for the plaintiff to show the location of the high-water mark, and where the land alleged to have been trespassed upon was situated, and not only what damages had been done to it from the cutting and removing of the trees, but how and to what extent, if any, the remaining land had been injured or depreciated by the defendant's alleged trespass. *Rutledge v. Mfg. Co.*, 430.

4. *Same—Evidence.*—Where the plaintiff brought an action in the nature of an action for trespass and for damages for the defendant's cutting and removing timber standing upon the lands, which he claims by adverse possession, depending upon the location of defendant's boundary line, testimony of the defendant's grantors that he had altered his deed with respect to this boundary is competent upon the question of defendant's good faith in claiming the lands and denying trespass, and as impeaching the validity of the defense and showing the true location of defendant's boundary, though not with reference, in this case, to its legal effect upon the continued validity of the defendant's deed. *Ibid.*

TRIALS. See Eminent Domain, 1, 16; Evidence, 7, 10, 17, 28; Injunction, 3, 4; Attorney and Client, 2; Railroads, 2; Easements, 1, 3; Appeal and Error, 13, 15, 27, 38; Contracts, 4, 9, 26; Fires, 1; Executors and Administrators, 9; Pleadings, 4; Instructions, 1; Employer and Employee, 4, 7, 9, 13; Parent and Child, 6; Trespass, 1; Partnership, 1; Libel 4; Statutes, 4; Negligence, 5, 21; Actions, 4; Criminal Law, 10; Homicide, 7; Intoxicating Liquors, 12, 20, 25; Receiving Stolen Goods, 1.

1. *Trials—Nonsuit—Evidence—Questions for Jury.*—In this action, involving the right of plaintiff to cut certain timber on lands of defendant, alleged by the latter to be under the size called for in the former's conveyance, *it is held* that a judgment as of nonsuit was improvidently entered upon the evidence. *Improvement Co. v. Brewer*, 248.

TRIALS—*Continued.*

2. *Trials—Arguments of Counsel—Court's Discretion—Appeal and Error.* Where the defendant admits the contract sued on, and relies upon its cancellation by the mutual agreement of the parties, the burden is on him to show such matter of defense, and each one having introduced evidence, the judgment of the trial court in allowing him to conclude is within his discretion under the rule, and not reviewable on appeal. *Bowman v. Development Co.*, 249.

3. *Trials—Verdict Set Aside—Issue Reversed by Trial Judge—Courts.*—The trial judge has the authority to set aside the verdict of the jury as to matters in his sound discretion or as a matter of law, leaving the cause at issue, C. S., 591; but he may not change the verdict and thereupon dismiss the action as a matter of law, the exercise of such power being allowed only for want of jurisdiction or upon the ground that no cause of action has been sufficiently alleged in the complaint. *Rankin v. Oats*, 517.

4. *Trials—Evidence—Colloquies Between Counsel and Witness—Presumptions—Action of Judge—Appeal and Error—Harmless Error.*—Colloquies between attorneys and witnesses aside from the purpose of the evidence should be avoided, both in criminal and civil trials, but assuming that the jury will determine the controversy upon the evidence, such will not be held for reversible error, when the trial judge takes prompt and sufficient action in eradicating their effect. *S. v. Evans*, 759.

5. *Trials—Attorney and Client—Improper Remarks—Argument.*—A remark of the solicitor in an argument to the jury upon the trial of the defendant for the illicit manufacture of liquor, as to the appearance of the defendant, who had not become a witness, being typical of a blockader, is improper, and when not corrected by the judge when called to his attention, is reversible error. *S. v. Murdock*, 779.

6. *Same—Instructions.*—Where the solicitor has made remarks to the jury, in his argument before them, to the prejudice of the defendant in a criminal action, the judge may either correct them at the time they have been called to his attention, or afterwards in his charge to the jury. *Ibid.*

7. *Same—Appeal and Error.*—Where the solicitor has gone outside of the evidence to make prejudicial remarks about the personal appearance of the prisoner on trial in a criminal action, and the judge, upon having it called to his attention, has stated he would correct it in his charge, his instruction in this case that the jury must confine itself to the evidence and not consider the personal appearance of the prisoner, *is held* sufficient to remove the prejudice, such matters being left largely in the discretion of the trial judge, and it being for the defendant to offer prayers for instructions more full and explicit should he have so desired. *Ibid.*

TRUSTS. See Pleadings, 1; Attorney and Client, 1; Appeal and Error, 10; Evidence, 7; Executors and Administrators, 6; Marriage, 2; Banks and Banking, 3; Deeds and Conveyances, 9; Payment, 4.

1. *Trusts—Fraud—Parol Trusts—Equity.*—Where the mortgagee of lands has induced the mortgagor not to file his petition in voluntary bankruptcy by agreeing by parol that the mortgage be foreclosed by suit,

TRUSTS—*Continued.*

bought in by the mortgagee, and held in trust to make it obtain the best available price, and in breach of this contract the mortgagee has become the purchaser at the judicial sale, and has failed to perform his agreement, and has negligently resold the land below the prices it should have brought, and the gravamen of the present action is the fraud thus perpetrated, the parol contract is but an incident to the fraud, against which equity will relieve; and the statutes in other jurisdictions which will not permit a trust in lands to be established by parol, has no application. *McNinch v. Trust Co.*, 33.

2. *Same—Constructive Fraud—Mortgages—Judicial Sales—Foreclosure.*—Where the mortgagee has become the purchaser of the mortgaged land in proceedings to foreclose by suit, and has perpetrated a fraud upon the mortgagor in violation of a parol agreement he had theretofore made with him, to hold the land in trust for certain purposes, the mortgagee's breach of the parol contract constitutes a species of constructive, if not actual fraud against which equity will relieve, and establish a trust in favor of the mrotgagor to prevent the perpetration of the fraud. *Ibid.*

3. *Trusts — Equity — Actual Fraud—Bad Faith—Constructive Fraud.*—Equity, in proper instances, will not withhold relief if actual fraud be not shown, when such conduct and bad faith is shown on the party against whom it is sought as would shock the conscience of the chancellor. *Ibid.*

4. *Same—Judgments—Estoppel.*—A judgment in a suit of foreclosure of a mortgage on land does not estop the mortgagor from showing such fraud therein on the purchaser's part as will create a constructive trust in his behalf. *Ibid.*

5. *Trusts—Mortgages—Equity—Damages.*—The rules of equity are those of conscience and prevail where the relief at common law is inadequate and deficient; and where the purchaser of land foreclosed by suit has fraudulently disposed of the lands which he should have held in trust, he will be held to respond in damages. *Ibid.*

TURNPIKES. See Eminent Domain, 1.

UNDERTAKINGS. See Injunction, 2.

UNDUE INFLUENCE. See Evidence, 2; Wills, 1, 2, 3, 4.

UNITED STATES MARSHAL. See Intoxicating Liquors, 10.

USES. See Estates, 5; Trusts.

VALUES. See Appeal and Error, 15; Landlord and Tenant, 8.

VARIANCE. See Escrow, 2; Larceny, 1.

VENARY. See Game, 2.

VENDOR AND PURCHASER. See Contracts, 4, 5, 6, 16; Evidence, 10; Liens, 2.

1. *Vendor and Purchaser—Sale—Implied Warranty.*—Where goods are sold without inspection the vendor impliedly warrants them to be at least merchantable. *Jewelry Co. v. Stanfield*, 10.

VENDOR AND PURCHASER—*Continued.*

2. *Same—Express Warranty—Contracts—Worthless Articles—Exchange—Consideration.*—Upon the sale of jewelry by sample with a written warranty that should any of the articles purchased fail to give absolute satisfaction to the user, the vendor would furnish new duplicate articles, upon their return, at his expense, the law will imply a warranty that they are merchantable or of some value; and where they are worthless, an exchange of like kind and quality would be of no benefit to the purchaser, and without consideration for their price, and he may recover without having complied with the terms of the warranty. *Ibid.*

3. *Same—Instructions—Verdict Directing.*—Where notwithstanding a warranty in the sale of jewelry that they should be returned and exchanged for others of like kind and quality, there is evidence tending to show that the articles were absolutely worthless, the failure of the purchaser to offer them in exchange will not warrant the trial judge in directing a verdict for the vendor, and the issue should be submitted to the jury with proper instructions. *Ibid.*

VENUE. See Removal of Causes, 1, 4.

VERDICT. See Appeal and Error, 1, 4, 16, 21, 44, 58; Carriers, 15; Criminal Law, 8, 12, 19; Landlord and Tenant, 5; New Trials, 1; Trials, 3; Wills, 8; Intoxicating Liquors, 14, 17, 19, 25; Judgments, 6, 7.

VESTED RIGHTS. See Constitutional Law, 1, 9; Deeds and Conveyances, 15.

VOTERS. See School Districts, 2; Elections, 2, 3, 4.

WAGES. See Contracts, 20.

WAIVER. See Insurance, Life, 1; Process, 3; Contracts, 12, 18; Appeal and Error, 27; Negligence, 10; Judgments, 5; Landlord and Tenant, 3.

WAR. See Payment, 1.

WAREHOUSEMEN. See Contracts, 3.

WARRANT. See Intoxicating Liquor, 2, 5, 9; Arrest, 1; Homicide, 1, 21.

WARRANTY. See Covenants, 1, 2.

WIDOW. See Wills, 2; Dower.

WILLS. See Estates, 1; Evidence, 2, 11, 18; Executors and Administrators, 11.

1. *Wills—Caveat—Marriage—Statutes—Undue Influence—Evidence.*—Our statute revokes any will made before marriage, and evidence that a will had been made prior thereto is not evidence of undue influence in the procurement of a subsequent will made in favor of the wife of the deceased. C. S., 4134. *In re Bradford*, 4.

2. *Wills — Caveat — Widow—Undue Influence—Evidence.*—Evidence that the widow left the State after the death of her husband, under whose will she was a beneficiary, does not tend to show undue influence on her part; and where the jury has accepted her explanation thereof, the caveators cannot successfully complain of prejudicial error. *Ibid.*

WILLS—*Continued.*

3. *Wills — Caveat—Undue Influence—Husband and Wife—Disparity in Ages—Intent.*—Great disparity of age between the deceased husband and his second wife, who benefited by his will, sought to be set aside for her undue influence, and declarations of the former deceased wife that in appreciation of the kindness of the propounder, whom he afterwards married, they desired to adopt her, or that after her apprehended death the husband should marry her, is not evidence that the second wife procured the will through undue influence. *Ibid.*

4. *Wills—Husband and Wife—Undue Influence—Evidence.*—The mere fact that the deceased husband had left a will bequeathing a large proportion of his estate to his wife, will not be considered as evidence that she exerted undue influence over him in the making of the will. *Ibid.*

5. *Wills — Devise — Estates — Lapsed Devises—Contingent Remainders—Deeds and Conveyances—Title.*—Upon a devise of a life estate to the testator's son, after a devise of a life estate to his mother, with further limitation over to the testator's children, and the heirs of such as are dead, the devise to the son lapses upon his death before that of the testator, and the mother being yet alive the contingency upon which he may take the second life estate can never happen; and the title to the estate vests in the testator's children who were alive at the time of his death, either by descent or by inheritance, subject to the life estate of the mother, and a deed in proper form executed by her and by them, being the tenant for life and the remaindermen, will convey the fee-simple title absolute, upon the facts stated in the case. *Allen v. Smith*, 222.

6. *Wills—Devise—Estates—Life Estates—Power of Disposition.*—A devise to the wife of all of testator's estate, "for and during her natural life to do with as she pleases and have the income therefrom," restricts her right to convey or dispose of any part of the estate, to that which she takes under the will, an estate for life. *Ibid.*

7. *Wills—Holograph Wills—Devisavit Vel Non—Animus Testandi.*—Upon the issue of *devisavit vel non* it is necessary that the paper-writing offered as a holograph will show that it was the maker's intention that it should be so regarded, from the character of the instrument itself and the circumstances under which it was made, and where the *animus testandi* thus appears as doubtful or ambiguous, the question is one for the jury. *In re Harrison*, 457.

8. *Same—Verdict.*—Where, upon the trial of *devisavit vel non*, the validity of a paper-writing as a holograph will is in question, a negative finding by the jury to an issue as to whether the deceased "wrote all of said paper-writing propounded with the intent that it should operate as her last will and testament, and was it found, after her death, among her valuable papers and effects?" is in effect a finding either that the paper was not written *animo testandi*, or was not found among the valuable papers and effects of the decedent, or both, either one of which is essential to the validity of the writing as a holograph will. *Ibid.*

9. *Wills—Estates—Contingent Remainders—Vesting of Title.*—A devise of land to the wife for life, and at her death or remarriage to be equally divided between certain of their children, "provided they have arrived

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